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Nov. 11. 1879

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. ~~282.~~ 62

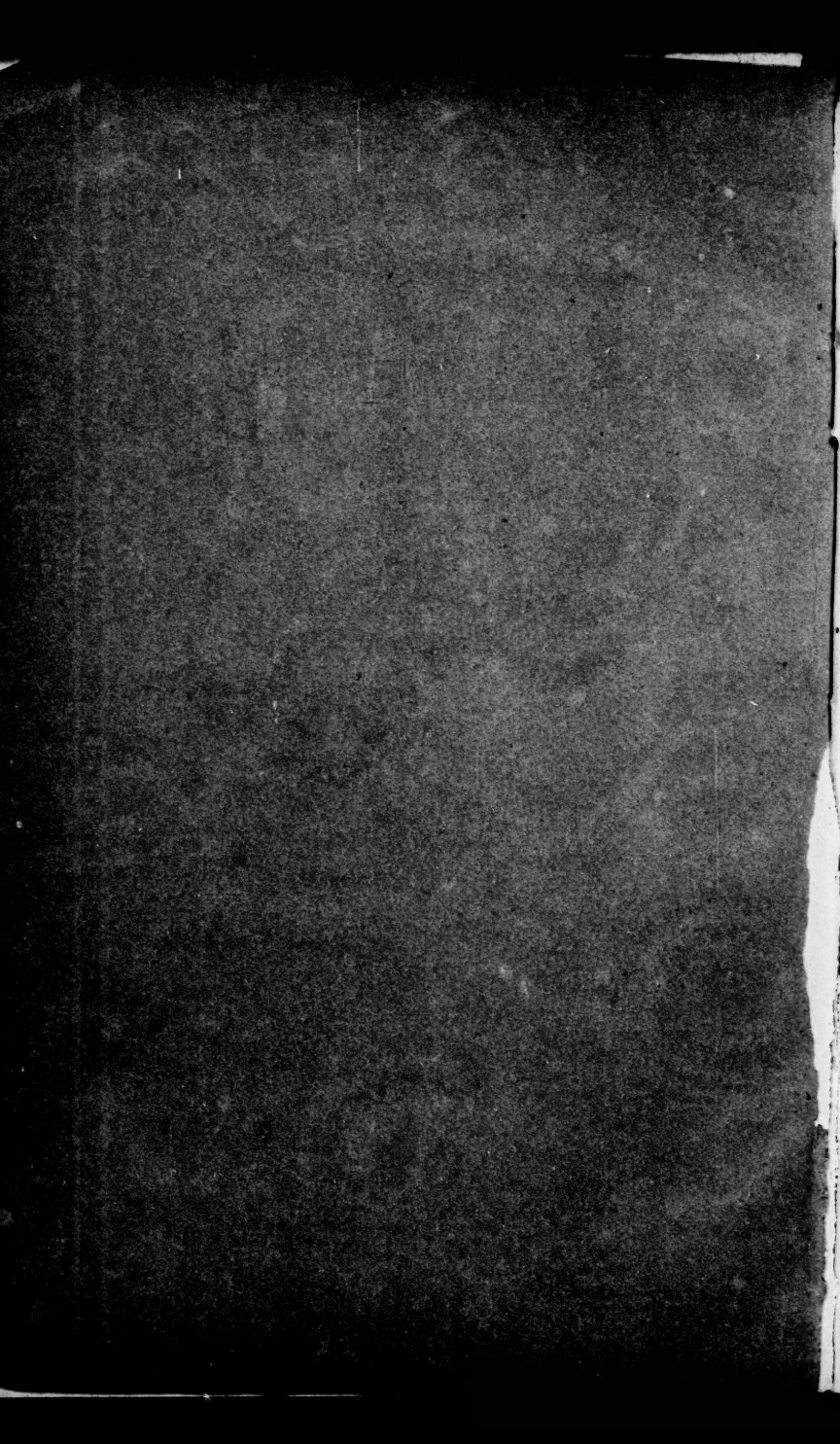
THE KANSAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

LOUISA TWOMBLY, ADMINISTRATRIX OF GEORGE W. K. TWOMBLY, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO

FILED OCTOBER 20, 1876.



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1 In the supreme court of the territory of Colorado.

Pleas in the supreme court of the territory of Colorado, held at the city of Denver, in said territory, at the February term of said court, begun on the second Tuesday of February, in the year of our Lord one thousand eight hundred and seventy-six, according to law.

Present, Hon. Moses Hallett, chief justice; Hon. Andrew W. Brazee, associate justice; Hon. Amherst W. Stone, associate justice; C. C. Tompkins, United States marshal, and Jno. W. Webster, clerk of said court.

2 THE KANSAS PACIFIC RAILWAY COMPANY, plaintiff in error,
vs.
LOUISA TWOMBLY, ADMINISTRATRIX OF THE estate of George W. K. Twombly, deceased, defendant in error.
} Error to the supreme court of Colorado Territory.

TRANSCRIPT OF RECORD.

3 TERRITORY OF COLORADO,
County of Arapahoe, ss:

Pleas in the district court of the first judicial district of Colorado Territory, sitting in and for the county of Arapahoe, before the honorable Ebenezer T. Wells, associate justice of the supreme court of said Territory, assigned to said judicial district, at a term thereof begun and held at the court-house in Denver, in said county, on the first Monday (it being the sixth day of October, A. D. one thousand eight hundred and seventy-three.

Present, honorable Ebenezer T. Wells, judge of said court; Merrick A. Rogers, esq., district attorney of said judicial dist.; Edmund A. Willoughby, sheriff of said county; George H. Mills, clerk of said court.

4 LOUISA TWOMBLY, ADMINISTRATRIX OF the estate of George W. K. Twombly, deceased,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.
} 2518. Trespass on the case.

Be it remembered that heretofore, and on, to wit, the 30th day of August, A. D. 1873, came the plaintiff by her attorneys, John Q. Charles, esq., and Alfred C. Phelps, esq., and filed in the office of the clerk of said district court her præcipe for, and sued out of said court a summons, which said summons is in the words and figures following, to wit:

District court summons.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

The people of the Territory of Colorado, to the sheriff of Arapahoe County, greeting:

We command you that you summon The Kansas Pacific Railway Company, if it shall be found in your county, personally to be
5 and appear before the district court of said Arapahoe County, on the first day of the next term thereof, to be holden at the court-

house in Denver, in said Arapahoe County, on the first Monday of October, A. D. 1873, to answer unto Louisa Twombly, administratrix of the estate of George W. K. Twombly, deceased, in a plea of trespass on the case to the damage of said plaintiff, as he says, in the sum of one hundred thousand (100,000) dollars.

And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness, George H. Mills, clerk of our said court, and the seal thereof, at Denver aforesaid, this 30th day of August, A. D. 1873.

[L. S.] GEORGE H. MILLS, *Clerk.*
By H. L. DENISON, *D'p'y.*

(Endorsed:) 2518. District court summons. Louisa Twombly, administratrix, &c. vs. The Kansas Pacific Railway Company.

6 TERRITORY OF COLORADO,
County of Arapahoe, ss:

SEPT. 2, 1873.

I have duly executed the within by reading the same to C. W. Fisher, division superintendent of Kansas Pacific Railway Company, and by leaving a true copy of this summons with him, as I am herein commanded.

DAVID J. COOK,
Sheriff.
By ED. HOLTZ, *Dep.*

Fees: Service, .75; mileage, .50; return, .75—$2.00.

Filed in the district court this 6 day of Oct., A. D. 1873.
GEO. H. MILLS, *Clerk.*

CHARLES & PHELPS.

And afterwards, and on, to wit, the 26th day of September, A. D. 1873, came again the said plaintiff by her attorneys as aforesaid, and filed herein her declaration, which said declaration is in the words and figures following, to wit:

7 TERRITORY OF COLORADO,
Arapahoe County, ss:

In the district court of the first judicial district of said Territory, within and for the county of Arapahoe, aforesaid. To the October term thereof, A. D. 1873.

Louisa Twombly, plaintiff herein, administratrix of the estate of George W. K. Twombly, deceased, who died intestate, by Charles & Phelps, her attorneys, complains of the Kansas Pacific Railroad Company, the defendant herein, of a plea of trespass on the case: For that whereas the defendant aforesaid, in the lifetime of the said George W. K. Twombly, to wit, before and on the first day of July, A. D. 1872, was a railroad corporation and was, before on the day last aforesaid, at, to wit, the county of Arapahoe, aforesaid, and in the lifetime of the said deceased, possessed of and using and operating a certain railroad
8 extending to, and into, and through a part of the city of Denver, in the county aforesaid, and was also then and there possessed of a certain locomotive engine, with a certain tender car thereto attached, which said locomotive engine and tender car were then and there

under the care and management of divers then servants of the said defendant, who were then and there driving the same upon and along the said railroad or a certain switch or side track thereof so in the possession of the said defendant as a part of its said railroad as aforesaid, at along or upon a certain street in the city of Denver aforesaid, commonly called Wyncoop street, the same being a public highway and near & towards a certain other public highway in the city of Denver aforesaid, then commonly called "I" street, the same being a crossing of the said railroad and a public highway as aforesaid, and while the said George W. K. Twombly was then and there with all due care and diligence passing, or attempting to pass, on foot along and upon the said I
9 street aforesaid & over and across the said railroad at the crossing of the said railroad by the said last named street as aforesaid upon the public highways as aforesaid there, the said defendant by its said servants so carelessly and improperly drove and managed the said locomotive engine and tender car, that by and through the negligence, want of care, and improper conduct of the said defendant by its said servants in that behalf, the said locomotive engine and tender car then and there ran upon and struck with great force and violence him, the said George W. K. Twombly, and then and there & thereby he, the said George W. K. Twombly, was with great force and violence thrown upon the ground, and by the said locomotive engine and tender car dragged along and upon the ground there for a considerable distance, to wit, a distance of one hundred feet, and the neck of him, the said George W. K. Twombly, was by the wheels of the said locomotive engine
10 and tender car run over and the head thereby severed from the body of him the said George W. K. Twombly, and he, the said Twombly, then and there killed.

And the plaintiff avers that the said George W. K. Twombly left surviving him Louisa Twombly, aforesaid, who is now living, his widow, to whose benefit the damage, if any, recovered in this action will enure.

And the plaintiff further avers that after the death of the said George W. K. Twombly, and on the 20th day of August, A. D. 1872, the plaintiff, by letters of administration of that date, duly issued to her out of and from the probate court of the said county of Arapahoe, was duly appointed administratrix of the estate of the said deceased.

And for that whereas, also, the said defendant heretofore in the lifetime of the said deceased George W. K. Twombly, to wit, on and before the first day of July, A. D. 1872, at, to wit, the county of Arapahoe aforesaid, was possessed of a certain other railroad, and using and operating the same, extending through a portion of the city of Denver,
11 in the county aforesaid, and was also then and there possessed of a certain other locomotive-engine, with tender-car attached thereto, which said locomotive-engine and tender-car were then and there under the care and management of divers their servants of the said defendant, who were then and there driving the same upon and along the said railroad, or a certain switch or side-track thereof so in the possession of the said defendant as aforesaid as a part of its said railroad, at, along, and upon a certain street in the said city of Denver commonly called Wyncoop street, which said street was then and there a public highway, and near and towards a certain other street and public highway in the city of Denver aforesaid commonly called I street, which was then and there a crossing of the said railroad and a public highway as aforesaid, and while the said George W. K. Twombly, the said deceased,
12 was then and there, as he rightly and properly might be, at and upon the said I street, and at the place of the crossing by the

same of the said railroad as aforesaid, upon the public highway, as aforesaid, there, the said defendants, by its said servants, so carelessly, negligently, & improperly drove and managed the said locomotive-engine and tender-car, that by and through the negligence, want of care, and improper conduct of the said defendant by its said servants in that behalf, the said locomotive-engine and tender car then and there run upon or against and struck with great force and violence him, the said George W. K. Twombly, the said deceased, and then and there & thereby he, the said deceased, was with great force and violence thrown upon the ground, and thereby greatly bruised, and wounded, and killed.

And the plaintiff avers that the said deceased left surviving him Louisa Twombly, his widow, who is still living, and for whose benefit the damages herein recovered, if any, will enure.

13 And the plaintiff further avers that on or about the 20th day of August, A. D. 1872, the plaintiff was, by letters of administration duly issued from and out of the probate court of the said county of Arapahoe, duly made and appointed administratrix of the estate of said deceased.

By means of which matters and things aforesaid, and by virtue of the statute in such case made and provided, an action hath accrued to the said plaintiff, and the said plaintiff hath sustained damages in the sum of one hundred thousand dollars, and therefore she brings suit, &c.

And the plaintiff brings into court here the letters of administration to her granted by the probate court of the county aforesaid, which give sufficient evidence to the court here of the grant of administration of the said estate to the said plaintiff, etc.

(Signed) CHARLES & PHELPS,
Plaintiff's Attorneys.

14 (Endorsed:) 2518, in the district court of the first judicial district of the Territory of Colorado within and for Arapahoe County, to the October term thereof, A. D. 1873, Louisa Twombly, administratrix, &c., vs. The Kansas Pacific Railroad Company. Trespass on the case. Damages $100,000. Filed Sept. 26, 1873. (Signed) Geo. H. Mills, clerk. Charles & Phelps for pl'tff.

And afterwards and on, to wit, the 7th day of October, A. D. 1873, (the same being one of the regular judicial days of the October term, A. D. 1873, of said court,) the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LOUISA TWOMBLY, ADM'X,
vs
KANSAS PACIFIC RAILWAY COMPANY. } 2518.

Now on this day comes the said plaintiff by J. Q. Charles, esq., and A. C. Phelps, esq., her attorneys, and the said defendant by Alfred
15 Sayre, esq., and C. W. Wright, esq., its attorneys, also come, and thereupon it is ordered by the court that the said defendant plead herein by or before the incoming of the court on the morning of Friday next, October tenth instant.

And afterwards and on, to wit, the 10th day of October, A. D. 1873, comes the said defendant by its attorney as aforesaid, and files herein its plea, which said plea is in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of said Territory, sitting within and for said county, of the October term thereof, A. D. 1873.

16 KANSAS PACIFIC RAILROAD COMPANY, *a'ts* LOUISA TWOMBLY, ADMINISTRATRIX, &C., of George W. K. Twombly, deceased.

And the said defendant, by Alfred Sayre and C. W. Wright, its attorneys, comes and defends the wrong and injury when, etc., and says that it is not guilty of the said supposed grievances laid to its charge in manner and form as the said plaintiff hath in her said declaration thereof complained against it; and of this it, the said defendant, puts itself upon the country, etc., by

SAYRE & WRIGHT,
Its Attorneys.

And the said plaintiff doth the like.

(Endorsed:) 2518. The Kansas P. R. W. Co. a'ts Louisa Twombly, &c. Plea. Filed Oct. 10, 1873. (Signed) Geo. H. Mills, clerk, by H. L. Denison, deputy.

17 And afterwards and on, to wit, the 19th day of December, A. D. 1873, (the same being one of the regular judicial days of the October term, A. D. 1873, of said court,) the following proceedings (inter alia) were had, and entered of record in said court in said cause, to wit:

Now on this day it is ordered by the court that the following-mentioned causes be set down for trial at the next regular term of this court upon the days hereinafter mentioned, that is to say, * * * * * * * * upon the twenty-second day of said term, G. D. No. 2518, Louisa Twombly, administratrix, &c., vs. Kansas Pacific Railway Company.

And afterwards and on, to wit, the 30th day of April, A. D. 1874, (the same being one of the regular judicial days of the April term, A. D. 1874,) the following proceedings (inter alia) were had, and entered of record in said court in said cause, to wit:

18 LOUISA TWOMBLY, ADMINISTRATRIX, &C., *vs.* KANSAS PACIFIC RAILWAY COMPANY. } 2518. Trespass on the case.

At this day comes the said plaintiff by J. Q. Charles, esq., and A. C. Phelps, esq., her attorneys, and the said defendant by Alfred Sayre, esq., and C. W. Wright, esq., its attorneys, also comes.

And therefore comes a jury, to wit, Wesley M. Failing, Stephen G. Hudson, George W. Spear, Jesse Durell, Andrew Templeton, Joseph E. Southworth, H. R. Tilett, London Mullin, David Klein, John W. Heck, Charles Alexander, and Otis A. Baker, good and lawful men.

And they are duly selected, tried, empaneled, and sworn, to well and truly try the issues herein joined and a true verdict give according to the evidence.

19 And afterwards and on, to wit, the 1st day of May, A. D. 1874 (the same being one of the regular judicial days of the April term A. D. 1874 of said court), the following proceedings (inter alia) were had and entered of record in said court, in said cause, to wit:

LOUISA TWOMBLY, ADMINISTRATRIX, &C.,
vs.
KANSAS PACIFIC RAILWAY COMPANY. } 2518. Trespass on the case.

At this day the issues herein joined coming on to be tried by the jury for that purpose empaneled and sworn, and the plaintiff having produced testimony to maintain the said issue upon her part, rested her case, whereupon the said defendant moves the court to give judgment of nonsuit herein.

And it appearing to the court here that the evidence produced by the said plaintiff is sufficient in law to maintain the said issues, the motion of the said defendant is denied.

And afterwards and on, to wit, the 4th day of May, A. D. 1874 (the same being one of the regular judicial days of the April term,
20 A. D. 1874), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LOUISA TWOMBLY, ADMINISTRATRIX, ETC.,
vs.
KANSAS PACIFIC RAILWAY COMPANY. } 2518. Trespass on the case.

At this day comes again the said plaintiff by J. Q. Charles, esq., and A. C. Phelps, esq., her attorneys, and the said defendant by Alfred Sayre, esq., and C. W. Wright, esq., its attorneys, also comes.

And the jury having heard the evidence produced, as well by the said plaintiff as by the said defendant, to maintain the issues herein joined, upon their oaths do say:

The said defendant is guilty in manner and form as the plaintiff hath complained thereof against it, and that the said plaintiff hath sustained damages by occasion of the premises in five thousand dollars (5,000.00).

21 And afterwards, and on to wit, the 26th day of October, A. D. 1874 (the same being one of the regular judicial days of the September term, A. D. 1874, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

At this day it is ordered by the court that the record of proceedings had on the 23d inst. be amended by erasing therefrom a certain entry therein appearing and purporting to be the record of certain proceedings had in the certain cause wherein Louisa Twombly, admi'x, &c., is plaintiff, and the Kansas Pacific Railway Company is defendant, and inserting therein in words and figures as follows, to wit:

LOUISA TWOMBLY
vs.
KANSAS PACIFIC RAILWAY COMPANY. } 2518. Trespass on the case.

At this day comes the said plaintiff by J. Q. Charles, esq., her
22 attorney, and the said defendant by Alfred Sayre, esq., its attorney, also comes. And the motion of the defendant for a new trial of the issues herein joined, coming on now to be heard, is argued by counsel; and the court being now sufficiently advised in the premises, it is ordered by the court that the said motion be denied.

Whereupon it is considered by the court that the said plaintiff do have and recover of and from the said defendant the sum of five thousand (5,000) dollars for her damages aforesaid, in form aforesaid

assessed, and her costs by her in this behalf laid out and expended, taxed at dollars, and have execution therefor.

Thereupon the said defendant prays an appeal from the judgment aforesaid of this court to the supreme court of this Territory, which is allowed it on condition that within thirty days from this day it file with the clerk of this court its bond in this appeal in the sum of ten
23 thousand (10,000) dollars, conditioned according to law, and with securities to be approved by the clerk, and day until thirty days from this date is given to the said defendant wherein to tender to the judge of this court a bill of the exception reserved to the ruling of the court upon the motion of the defendant for a new trial herein, and when allowed and sealed by the judge of this court let the said bill of exceptions be filed as of this day.

And afterwards and on, to wit, the 17th day of November, A. D. 1874 (the same being one of the regular judicial days of the September term, A. D. 1874, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LOUISA TWOMBLY, ADMI'X, &C., *vs.* THE KANSAS PACIFIC RAILWAY COMPANY.	2518.	Trespass on the case.

24 At this day comes the said plaintiff by J. Q. Charles, esq., her attorney, and the said defendant, by Alfred Sayre, esq., its attorney, also comes.

Whereupon on motion of the defendant it is ordered by the court that day until the 30th inst. be given it in which to tender to the judge of this court (or in case the said judge is not then present in the county of Arapahoe, then to deliver the same to the clerk of this court) its bill of the exceptions reserved by it upon the trial of the issues herein joined, which, when allowed and sealed by the said judge, shall be filed herein as of the 23d day of October ultimo.

And afterwards and on, to wit, the 20th day of November, A. D. 1874, comes again the said defendant, by its attorneys as aforesaid, and files herein its appeal bond in this cause, which said bond is in words and figures following, to wit:

Know all men by these presents that we, the Kansas Pacific
25 Railway Company, a corporation under and by virtue of the laws of the State of Kansas and the laws of the United States, as principal, and J. Sidney Brown, of the county of Arapahoe and Territory of Colorado, as sureties, are held and firmly bound unto Louisa Twombly, administratrix, &c., of the estate of George W. K. Twombly, deceased, in the penal sum of ten thousand dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this fifteenth day of November, A. D. one thousand eight hundred and seventy-four.

The condition of the above obligation is such that whereas the said Louisa Twombly, administratrix of the estate of George W. K. Twombly, deceased, did, on the twenty-third day of October, A. D. one thousand eight hundred and seventy-four, recover a judgment in the district court of the first judicial district of the Territory of Colorado,
26 sitting within and for the county of Arapahoe, against the above bounden Kansas Pacific Railway Company, for the sum of five

thousand dollars and costs of suit, from which said judgment the said Kansas Pacific Railway Company prayed and obtained an appeal to the supreme court of the Territory of Colorado upon condition that the said Kansas Pacific Railway Company within thirty days thereafter file an appeal bond with sureties to be approved by the clerk of said district court, with conditions thereunder written as provided by law and the order of said court, and in the penal sum aforesaid:

Now, therefore, if the above bounden Kansas Pacific Railway Company shall duly prosecute said appeal, and shall also pay the said judgment, interests, and costs, as well as all damages, in case the said judgment shall be affirmed in said supreme court, then the above obligation to be null and void, otherwise to remain in full force and effect.

In witness whereof the said Kansas Pacific Railway Company
27 has caused its name and corporate seal to be affixed, and the said J. Sidney Brown have set their hands and private seals the day and year first above written.

THE KANSAS PACIFIC RAILWAY COMPANY,
{ KANSAS PACIFIC RAILWAY COMPANY. SEAL. } By ADOLPHUS MEIER,
V. Presid't.
J. SIDNEY BROWN. [L. S.]

Attest:
D. M. EDGERTON,
Secretary.

(Endorsed:) 2518. Louisa Twombly, administratrix, &c., vs. Kansas Pacific Railway Company. Appeal bond. Approved and filed by me this 20th day of Nov'r, A. D. 1874. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 22d day of January, A. D. 1875, comes again the said defendant, by its attorneys as aforesaid, and file herein (as of Oct. 23d, A. D. 1874) their bill of exceptions, which said bill, &c., is in words and figures as follows, to wit:

28 *Bill of exceptions.*

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of Colorado, sitting within and for the county of Arapahoe. Of the September term, A. D. 1874.

LOUISA TWOMBLY, ADMINISTRATRIX OF THE estate of George W. K. Twombly, deceased,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.

Be it remembered that on the day of , A. D. eighteen hundred and seventy-four, the same being one of the regular days of the April term of said court on said year, the plaintiff, to maintain the issues on her part, gave in evidence to the court and jury as follows, to wit:

Plaintiff offered in evidence letters of administration issued out of the probate court of Arapahoe County, Territory of Colorado, bearing
29 date 20 August, '72, to Louisa Twombly, of the goods and chattels, rights, and credits which were of George W. K. Twombly, deceased.

(Objected to by defendant: 1st, by reason of erasure; 2d, because it is an original instrument, and belongs elsewhere, and is not the certified copy required by law. Objection sustained.)

Plaintiff called HUGH GOODFELLOW, who was duly sworn, and testified as follows:

Q. Were you acquainted in his life-time with George W. K. Twombly?

Ans. I was.

Ques. How long previous to his death had you known him?

Ans. I have been acquainted with him ever since I came to Denver. That I believe is five years last fall.

Q. About what time did he come to his death, did you know?

Ans. Well, I don't really recollect the date. I know it was in the spring. He came to his death two years ago, I believe.

Q. How long immediately before his death had you seen him before he was killed?

Ans. Well, I saw him and spoke to him. All the time he had to spare was walking a half block. I was speaking to him half a block from where he was killed.

30 Q. At the time you were speaking with him you was about half a block from where he was killed?

Ans. About half a block. On the corner of I, I believe it is, or eighteenth street and the railway crossing.

Q. What street is the railway crossing on?

It is on Wyncoop street.

Q. How far did you say it was from where you and he were talking to the place of the accident?

Ans. About half a block.

Q. On which side of the railway were you when you were talking?

Ans. I was—I believe it would be north from here—on the other side from here; I lived there.

Q. Did you see the accident as it occurred there?

Ans. I did not.

Q. Did you see him before he was removed from the spot?

Ans. I did, and helped to remove him.

Q. Describe to the jury where the body was at the time that you saw it first, and what condition, and how it was situated with reference to the track.

Ans. The body was lying between two railroads, the Rio Grande
31 and the Denver Railroad; and the head was severed from the body, laying very near in the center of the Kansas Pacific track.

Q. Where was the body?

Ans. The body was laying between the two tracks, the two railroads; there is a space between the two railroads.

Q. What marks, if any, did you notice upon the body?

Ans. The body was considerably mangled up, and the head was severed from it; that was chiefly all that I took notice to.

Q. Was there anything about the body or the appearance of it by which you could tell whether or not it had been dragged from the point from the place where it was first struck?

Ans. Well, I really could not say about that; there was dirt on the clothes, and the blood was there to be seen on the clothes. There was evidence it must have been dragged or rolled or something.

Q. Where did you remain from the time you was talking with
32 him up to the time that you found his body upon the track?

Ans. I turned around to go into my cellar for to bring up some ale.

Q. Where is your place of business?

Ans. My place of business was down there on his property, at that time on I street, on the corner of the alley-way. I turned round to go into my cellar for to bring up some ale—I really could not say—I was part way down stairs, did not get the ale, when I heard an alarm, boy hollering somebody being killed, and I got up and I ran right straight over to the scene.

Q. Had you been observing the train on the tracks there previous to that, on that morning? What trains were on the track at or about the time immediately before the accident?

Ans. Before I turned round to go down into the cellar, I could see the Rio Grande going out, quite a long train; I could not say how many cars; and the train was down probably a block by the time I got round.

33 COURT. While you were going down cellar after conversation with deceased?

Q. What other train or engine or anything of that kind was passing along at that time, if any?

Ans. When I went to the scene where the man was killed, the Kansas Pacific switch engine number one was right close by the body, a few feet from it, there, and the other train had been going on out, the Rio Grande train.

Q. Before the accident happened had you seen this switch engine?

I did not take notice to it. I believe I noticed train going down to coal yards, but I did not take notice to the train coming back.

Q. I wish you would give your special attention to that question a moment and see whether you are correct about that. State if previous to this accident while talking with Twombly you had observed the switch engine of the Kansas Pacific as well as the Rio Grande train or not.

34 Ans. I did not; really I don't believe I took notice to the other engine coming up.

Q. State if you know anything in regard to whether there were bells being run' on that occasion by this engine or by this Kansas Pacific engine.

Ans. Well, I can't really swear about it, as there is a great many say that it was not. I don't think that I can.

Q. And you say you were how far from the track?

Ans. I was half a block.

Q. What were your opportunities for knowing?

Ans. I believe the bell was not rung, because (objected to) I could always tell it, one sound from the other. There is a great deal of difference in the sound of the bells of the two locomotives. I believe the bell was not rung, for I could have heard and understood if it was, I was so near to the track.

That was where you lived, was it?

Ans. Yes.

Q. You were accustomed to these bells?

COURT. You lived at the corner of the alley-way and I street, I understand, on the other side of the Wyncoop?

35 Ans. Yes, sir; between Wyncoop and Wiwatta.

PL'FF'S ATT'Y. Q. From the spot where you found Twombly's body, how far was your place of business?

Ans. It was a half a block, and then I could not really describe how many feet from the corner. It was a few feet from the corner of the street.

Q. You speak of the corner this way, on the west side of I street.

Which corner did you speak of? Where was the body as relates to I street when you found it?

Ans. It was lying, I believe, northeast or in that direction, the body lying above it or below it.

Ques. What direction did Twombly go after you and he ceased talking?

Ans. He walked straight from that corner to where he got killed. I was talking to him at the corner of the alley-way. I stood in my door and he stopped to speak to me, and turned right and came on up the street.

Ques. And came on up the street?

Ans. Yes.

36 Ques. Where was the engine of the Rio Grande train at the time you turned to go down cellar?

Ans. It was between Sixteenth and Seventeenth street, I believe.

Q. What were the names of those streets at the time?

Ans. G and H, I believe.

Ques. Which way was the Rio Grande train going?

Ans. It was going south—going out in the morning.

Ques. Which way was the engine of the Kansas Pacific moving?

Ans. It was moving north.

Ques. That is, they were passing in opposite directions, were they?

Ans. Yes, sir.

Ques. Was the engine of the K. P. backing or pushing forward?

By the way it appeared when I got to the scene, it was backing. After it run over the body the front end of it was to the body; so it must have been backing.

Ques. About how far apart, then, were the engines of the Rio Grande and the K. P. switch engines at the time that you turned to go down or the time you heard the shout of the accident having occurred?

Ans. It must have been a block or a little more.

Ques. What is the distance of a block?

37 Ans. Well, that I really can't tell you. Sixteen lots, twenty-five feet to the lot, I believe.

Ques. These engines you say something over a block. What was the character of the bells of the two engines?

Ans. The difference in sound?

Ans. Yes, sir.

WITNESS. The one is a sharp, clear sound, and the other a heavy sound. The Rio Grande has got a sharp, clear sound, not so strong as the Kansas Pacific bell; quite a difference in the distinction of sound.

Ques. How long did you talk with Twombly on that occasion?

Ans. It was not any great length of time at all; the man hardly spoke to me at all. He was in a hurry; hardly stopped to speak; just barely spoke, and I was speaking about hiring a man, and he just barely made answer and turned round; seemed to be in a great hurry.

Ques. What time of day was it?

Ans. About seven o'clock.

Ques. Was it the time or not of people generally going to their work—laboring men?

Ans. Yes; about the ordinary time of going to work.

38 Ques. Do you know who was managing the Kansas Pacific engine that morning?

Ans. Well, I believe the engineer that always had been running it, and the one on the engine is in the court-room at the present time. Walker is the name to the best of my opinion.

Ans. Yes, sir. He is stated in application for letters to have died that day.

44 Examination of witness GOODFELLOW continued, as follows:

Ques. Were you acquainted with the character of Twombly in his lifetime as a business man?

Ans. Yes.

(Objected to by defendant. Objection overruled.)

Ans. I was.

State what that character was during the time you had known him.

Ans. He was a man that was very ambitious; easily excited; wanted to be in all kinds of business; tried to make money; tried to get along; tried to do something. He was always a hard-working man.

(Defendant's counsel objected to the answer of the witness, but the court overruled the objection.)

He done a great deal of everything. He made brick and he farmed, and he dug cellars here in the city. He kept teams running, hauling the dirt out of cellars all the time when he had them here; such work as that.

(Defendant excepted to those statements as above.)

Ques. Did he or not, previous to his death, have a family dependant upon him? State whether or not he had, at the time of his death
45 and previous, a family dependant upon him for his support?

(Objected to by defendant. How can this witness know whether he had a family dependant on him?)

COURT. You may ask whether he had a family or not.

Ques. State whether or not he had, at the time of his death and previous, a family?

Ans. He had.

State what his family was?

Ans. There were three boys, I believe, of his own, and then his wife. There was two more with his wife, and they all lived under his roof, and he seemed to be the head of the house; seemed to be master of the whole place.

Ques. Was there a girl?

Ans. Yes, sir.

Ques. How many of these children were the children *were the children* of this plaintiff, Louisa Twombly?

Ans. There were two.

Ques. What were the ages of these children, if you know—of all the children?

Ans. Well, I really think that there was only one of them of age; one of the five only was of age. There might have been two.

46 Ques. The girl and the boy, who, you say, were Mrs. Twombly's children, were they of age or not?

Ans. No; they were not of age.

Ques. State what, if any, opportunities you had for knowing what provision or support he made for his family in his lifetime—how he provided for them?

Ans. I really cannot tell that. I never heard of them having to go to look to any other person for anything to eat. I don't know anything more than that.

Ques. Have you a family; had you at that time?

Ans. No; I had a wife; that was all the family consisted of—two of us.

Upon cross-examination, the witness, Goodfellow, testified as follows:

Ques. I don't quite understand where you reside, as relates to the scene of this accident; where you did at the time. Please state it again.

Ans. It was just half a block from where the accident occurred; half a block from where the accident occurred; half a block on I street,
47 down below Wyncoop; half a block below Wyncoop.

Ques. Towards the Platte river?

Answer. Yes.

Ques. From where you lived it is a half block up to the corner of Wyncoop?

Ans. Yes.

Ques. From where this accident is supposed to have occurred is an additional distance of some feet?

Ans. Well, where the body was lying when I discovered the body.

Ques. It is some feet beyond the corner?

Ans. Yes.

Ques. How long had you lived there at this time, or in that vicinity?

Ans. I had been living on the same place for some six or seven months.

Ques. You were familiar with the lay of the ground and everything of that kind around there?

Ans. I was.

Ques. These tracks are on Wyncoop street, as I understand.

Ans. I believe they are.

Ques. The Rio Grande track starts at the Rio Grande depot, does it not?

Ans. That I can't tell you. There is a part of their track goes above the depot, I think.

Ques. That is the termination of their road generally?

Ans. That is what they call it.

48 Ques. Then that goes down near the Kansas Pacific to Cherry Creek and crosses it? Now the broad-gauge or Denver Pacific track goes down in the same direction, but stops at the coal-yard?

Ans. I believe.

Ques. That coal-yard extends from F street back to G, does not it?

Ans. I believe it does. It is in the limit of the block.

Ques. When the track of the Denver Pacific or Kansas Pacific broad-gauge leaves the coal-yard it comes up towards the narrow-gauge track, does not it?

Ans. It does.

Ques. And for the most of the distance from G street to I, and beyond, the tracks are parallel?

Ans. They are.

Ques. About how far are these tracks apart?

Ans. I should judge between four and five feet where the accident occurred. I never measured.

Ques. From the point where this accident occurred, or where you saw this body, or from the crossing of Wyncoop and I streets, how far each way can you see these two tracks?

Ans. Well, I can see the broad gauge or Kansas Pacific down
49 to the coal yard, I believe, and the other one I can see to F street, or over in that direction, and I can see up to the Rio Grande depot the other way.

Ques. Then there is a plain, unobstructed view of each track from

this point where the accident occurred for a considerable distance each way?

Ans. Yes.

Ques. Is there any object, natural object, to prevent a person from seeing each of those tracks, and for a considerable distance each way, from that point?

Not as I know of.

Ques. When you last saw Twombly alive, he was some distance, half a block, between I street at your house?

Ans. He was.

Ques. What was the position of the body when you saw it, after he was dead?

Ans. The body was lying between the two railroad tracks of the two different railroads, and the head was laying in between the rails of the wide-gauge track.

Ques. The head had been, apparently, cut off by the wheels of the switch engine running over it?

Ans. Yes, sir.

Ques. The feet were toward the narrow gauge?

Ans. Yes.

50 Ques. Did you see any indications, by way of marks in the ground, or blood, or anything of that sort, that would indicate where this accident occurred?

Ans. I did.

Ques. Where did it seem to have occur?

Ans. For some distance towards I street, to where the body was lying, there was blood along close by the railroad, and little bits of flesh along close by the rail of the wide gauge.

Ques. Which rail of the wide gauge do you speak of?

It was the one next to the Rio Grande, I believe.

Ques. You saw nothing of this kind on the other rail, the one toward the Platte River?

Ans. I seen indications to where the body had been dragged upon the track, all along from—I should judge——

Ques. I am speaking of the two rails, that is between the two rails on the wide-gauge track on the wide-gauge railroad; there was indication where the body had been dragged; was there any marks of blood on the rail of the wide-gauge track, on the rail on the lower side of the street?

Ans. I can't say as there was.

51 Ques. When Twombly left you, you said he seemed to be in a great hurry?

Ans. He did.

Ques. You spoke to him in reference to his employing a man?

Answer. I did.

Ques. How much attention did he seem to pay to that, your request?

Ans. Not a great deal; for he seemed to be in a hurry. He did not stay to linger upon the matter at all. He just made a motion—did not want the man—and I believe uttered some language something to that effect; I could not distinguish; he went on; it was evident he did not want the man.

Ques. Had you seen him on that morning before?

Ans. I had.

Ques. Did you have conversation with him?

Ans. Not previous to that, that I recollect of.

Ques. Where had you seen him before this?

Ans. I had seen him down back of his barn; back where I live, around

among stock. He did not directly make a statement; heard him make remark, he was in a hurry to go clean out a house on Wazee street.

52 Ques. Where is Wazee from the railroad tracks?

Ans. It is this side; he had to cross the railroad track to get there.

Ques. When did he make this remark you heard?

Ans. Just a few minutes before he came past my place. Heard him holler to one man over there, working there, to come with the team and he would go on foot.

Ques. What did you say was the time of this accident, so far as the hour of the day was concerned?

Ans. Somewhere about seven o'clock in the morning. It might have been a few minutes before or after.

Ques. Was it about the ordinary time of the departure of the Rio Grande train, or had you before heard anything in regard to the departure of the train?

Ans. It was about the time of the train going out.

Ques. Where had Twombly lived? How long had he lived at this particular place you speak of where he resided at the time of this accident?

Ans. I believe he lived there over a year. I could not say, as

53 he was two years on that same place where he lived at the time.

Ques. How far is that from the railroad?

Ans. It is pretty near a block; very near the width of the block, not the length; no, the block fronts on Wazee and Wyncoop, the ends on I, I believe.

Ques. How long did he live there before going to this place?

Ans. He had been living there when I came to this country to live myself.

Ques. Some three years ago; that is, before the accident?

Ans. Yes.

Ques. Did trains and engines frequently or ordinarily pass along those roads about that time?

Ans. They did.

Ques. I understand you to say that you gave no special attention to the switch-engine that was coming up from the coal-yard?

Ans. I did not.

Ques. You saw such an engine, did you?

Ans. I saw an engine going down towards the yard, but as to paying any particular attention to it coming back I did not.

Ques. When you stated how far apart the engines of the two

54 roads were at the time you went down into the cellar, I suppose you merely estimated that you was paying no special attention to the switch-engine, were you?

If I answered that way, I have reference to at the time I heard the boy give the alarm of being run over. I turned a few feet, run to the door, then perceived one engine going past. Saw the distance they were apart then; that is the way I meant to answer that question, if I answered it right.

Ques. I only want to understand you. You think at the time after this accident occurred, when you heard the alarm and so on, that the engine of the Rio Grande train going towards Cherry Creek was about at what point?

Ans. It was, I believe, somewhere between G and H, a little way past H; that was the name of that street at that time.

Ques. The switch-engine was out somewhere beyond I street, I understand you. Where was the switch-engine then?

Ans. The switch-engine was just got across I street.

55 Q. I suppose you gave no special attention to the ringing of bells or other signals, if any were given at that time?

Answer. To the best of my knowledge there was no bell rung. There was no motion as though the bell had been ringing when I got there to the scene, when I run right straight over. The reason I give this evidence, if the court will allow me, the bell was not moving; did not seem to be moving. This was after the accident.

Ques. I mean before that and at the time you went down cellar, and soon, you did not have your attention attracted particularly to whether bells were rung, whether signals were being given; you did not think anything about it, did you?

Ans. As a general thing, if the bell swere rung I could always tell or distinguish the difference between the two bells.

Ques. I say nothing called your attention particularly as to whether bells were or were not rung before this accident occurred?

56 Ans. No; nothing.

Question. What you mean to say is that it seems to you now as though you would have heard bells ring if there had been?

Ans. Yes; that is——

Ques. But there was nothing called your attention to it particularly?

Ans. I have answered the question.

Ques. Do you recollect anything about the length of this train of the Rio Grande road?

Ans. It was a good long train, a longer train than usually went out at that time.

Ques. What was the character of the train, was it passenger or freight? What sort of cars?

Ans. I believe it was freight chiefly.

Ques. What kind of freight-cars?

Ans. A good many of them was low cars, what they call flat cars.

Ques. Were they those-cars they load lumber on?

Ans. They were not box cars.

Ques. These flat cars having stakes on the sides to hold lumber?

Ans. Yes; sometimes no stakes on them.

Ques. Did you observe as to whether those cars were loaded generally or empty on the Rio Grande on that morning?

57 Ans. I did not pay no particular attention to whether it was a loaded train or not. They don't generally load going out. They take out empty cars to bring in goods upon them; to bring in wood, rock.

Ques. From your observation of the running of trains of that road the cars are very apt to go out empty going south, they come in with lumber and coal and the like?

Ans. Sometimes they did.

Ques. Just now I understood you to say they took back empty cars?

Ans. Yes.

Ques. More apt to be empty than loaded, a great many of them?

Ans. More apt to be empty than loaded.

Ques. Do you recollect how many times you had seen this particular switch-engine run by there going down to the coal-yard?

Ans. I don't. Never counted the number of times.

Ques. Did you ever make any particular examination of that engine?

I did not. It went down very often in the morning; then I could not say it went every morning.

Ques. You never made any examination of that engine so as to compare it with others?

58 Ans. Yes; I took notice it was used as a switch-engine with a foot-board upon it, as I would call it. It was used as a switch-engine; could see that it was not an engine used for running on the track.

Ques. Explain what you mean by a foot-board to this switch-engine.

Ans. It is a place for a man to stand upon—the helper.

Ques. At each end of the engine?

Ans. One at the end of the tender and another in front of the engine.

Ques. Is it a board that bridges from track to track, or beyond?

Ans. A board along on the engine; it is on the same engine, I believe.

Ques. About how high from the rail is this foot-board at each end of the switch-engine; that is, the engine and tender?

Ans. I should judge it would be eight or nine or ten inches, somewhere along there. I never measured it.

Ques. It is just a step, is it?

Ans. Yes. I always took notice of that engine, number one; this foot-board there is one in front of the locomotive, and then another one at the end of the tender.

59 Ques. Do these foot-boards, or steps, extend clear across the track, the whole width of the track, and further?

Ans. I believe they do, a' the width of the track or may be a little more. I guess they do a little more.

Ques. Would not that foot-board, whichever way the engine might be going, there being one at each end, would not that be the first object to strike or hit a person the track?

Ans. It seems it would; I am not positive. It would depend upon the way man was standing; if he was leaning one way or the other, it seems to me that that would be the first thing would strike.

Ques. These foot-boards are put there for the purpose of enabling persons engaged in making up trains, and so on, whenever they want to step right on them?

Ans. That is what it is used for. I have seen men standing there.

Ques. This passing of trains at that hour in the morning, passing along like that, was, as I understand you, was a common ordinary occurrence, at that hour of the morning?

60 Ans. I don't know as it was an every day occurrence. It could not have been at that time. It was with the Rio Grande.

Ques. It was a thing that excited no surprise at that time, or no particular attention?

Ans. That coal-train went down very frequently at that time.

Ques. These tracks, of course, were made for their use, and there were trains and engines passing in the morning, quite a common occurrence, was it not?

Ans. Yes.

Ques. Has been so ever since the two roads were constructed. You spoke something about a remark Mr. Twombly made before you had your conversation with him; do you recollect what was said?

Answer. I remember he told one man to hurry up, get the team over, he wanted to get the house cleaned up.

Ques. How long was this before you spoke to him about employing a man?

Ans. It was only a few minutes, could not have been many minutes

He only walked round the other side of the building. I had been
61 pumping some water at the well, passed round, talked to him as he passed by.

Ques. You don't mean to say many minutes?

Ans. No; only a short space of time. Could not tell how long; it was not a very long time.

On re-examination, witness Goodfellow testified as follows:

Ques. You speak of these indications you saw; judging from the indications you saw of flesh and blood, at what point on I street should you say this body was struck first, and how far dragged?

Ans. I should judge I seen indications of where the body was dragged some nine or ten feet, or it might have been a little more than that, not a great deal, though, that the indications showed.

Ques. Did you trace these indications back into I street?

Ans. I did not.

Ques. Back to the street?

Ans. No; it came very near; there was a bridge across the ditch; it was right near to that the indications was.

61½ Ques. On which side of I street was Twombly when you saw him?

Ans. On the west side of the street, on the opposite side of where the body laid when I found him.

Ques. Were there any marks on this K. P. engine by which you could identify it?

Ans. I believe a number on it.

Ques. Any letters?

Ans. No. I did not take notice to any other.

Ques. When you speak of your being a half block from Wyncoop, you speak of a half block the short way, don't you?

Ans. Yes; from the corner of the street to the alley.

Ques. Which would be a little less than one hundred and twenty-five feet?

Ans. One hundred and twenty five feet.

Ques. Speaking about these foot-boards, do they extend out any further on the sides of the engine than the cow-catcher, or whatever you call it, would over the track?

Ans. I believe they extend a little over the rail. I guess they extend a little further over.

Ques. That extends somewhat over the track, too, don't it?

Ans. Yes. A very little, I guess.

62 Ques. by deft's att'y. Describe those ditches at I street?

Ans. It is the ditches on the side of the street where the water runs through.

Ques. Running right down on each side of I street?

Ans. Each side of I street; yes.

Ques. Were they bridged over between the two tracks?

Ans. Yes. I believe they were covered over with boards.

Ques. What was the character of the space between these two tracks? Was it level and smooth, or rough and uneven?

Ans. It is neither very rough or very smooth, it is rolling from one track to the other.

Ques. In this space between the two tracks, don't the ties extend from each track?

Ans. A very short ways.

Ques. Are these ties all of a length or irregular?

Ans. They are irregular; they stick out further at one place than another.

Ques. Between these two tracks is what might be called a sort of open ditch, that is, not a deep one, but a hollow?

Ans. No; it is a hollow.

Plaintiff counsel. A slight descent and then an ascent? Ans. Yes, sir.

63 At this stage of the trial the jury were sent out by consent of parties to view the scene of the alleged accident in charge of a bailiff of the court, and the witnesses mutually agreed upon by the parties to point out the locality, and both the said witnesses were by the court charged to hold no conversation with the jury save to designate the locality, and the jury were charged to hold no conversation among themselves, nor with any other save to inquire as to the locality of the alleged accident.

Plaintiff again offered in evidence the letters of administration from probate court before noted. And it was shown by the statement of A. C. Phelps, esq., which was received without objection, that he had obtained the paper from the *paper from the* office of the probate judge, and that the same was in the same condition as when received by him from that office.

64 Defendant's counsel nevertheless objected to the reading of the said paper in evidence, but the objection was overruled, and the letters were then read in evidence, and are in words and figures as follows, to wit:

Letter of administration.

TERRITORY OF COLORADO,
Arapahoe County, ss:

The people of the Territory of Colorado to all to whom these presents shall come, greeting:

Know ye that whereas George W. K. Twombly, of the county of Arapahoe, and Territory of Colorado, died intestate, as it is said, on or about the first day of July, A. D. 1872, having at the time of his decease personal property in this Territory, which may be lost, destroyed, or diminished in value if speedy care be not taken of the same: To the end thereof that said property may be collected and preserved for those who shall appear to have legal right or interest therein, we do hereby ap-

65 point Louisa Twombly, of the county of Arapahoe, and Territory of Colorado, administrator of all and singular the goods and chattels, rights and credits which were of the said George W. K. Twombly, at the time of his decease, with full power and authority collect and secure the said property and debts wheresoever the same may be found in this Territory, and in general to do and perform all other acts which now are or hereafter may be required of him by law.

Witness Henry A. Clough, probate judge for the said county of Arapahoe, at his office in Denver, this 20th day of August, A. D. 1872.

SEAL OF THE PROBATE COURT. HENRY A. CLOUGH, [SEAL.]
Probate Judge.

(Endorsed:) In re estate of G. W. K. Twombly, deceased. Letter of administration to Louisa Twombly. Issued Aug. 20, 1872. H. A. Clough, probate judge. Recorded in book 1, page 568.

66 And the plaintiff, further to maintain the issues on her part, gave in evidence to the court and jury as follows:

JOHN E. WALKER sworn.

Ques. Where were you on or about the 1st of July, 1872?

Ans. I was running engine number one in the Kansas Pacific yard.

Ques. How long before that time, if at all, had you been engaged in that way on the Kansas Pacific road?

Ans. Between the 20th and 30th of February; I think about the 20th of February.

Ques. In whose employ were you?

Ans. I was hired by the Kansas Pacific Railway Company at Kansas City, and sent there.

Do you know of the happening of the accident which resulted in the killing of Mr. Twombly?

Ans. I was running the engine at the time.

Ques. Do you know about what date it was?

Ans. I think it was on the morning of the first of July, 1872.

67 If I am not mistaken, I think it was Monday morning.

Ques. How long after that time did you continue in the employ of the Kansas Pacific Company?

Answer. Until the 15th of that month, Sunday.

Ques. About what time of day did this accident occur?

Answer. About six thirty in the morning.

Ques. When did you first know that it had happened?

Ans. Not until after accident had happened.

Ques. Did you see the body afterwards?

Ans. I did; yes, sir.

Ques. Did you see it before it was moved from the place of the accident?

Ans. Yes, sir.

Ques. What was its condition—how was it situated?

Ans. Lying on the back between the K. P. and Rio Grande, the head took completely off. When I got back to it, if I am not mistaken, it was Mr. Twombly's son had the head up in his hand.

Ques. Have you any knowledge how the accident happened?

No, sir; none at all. How he got there I don't know anything

68 about. I did not see him before.

Ques. When you say you were running the engine, what do you mean by that?

Ans. I was the engineer.

Ques. Who else was with you at that time?

Ans. In the cab, Moulton just about that time taking charge of the Denver Pacific shops, Mr. Smith, yardmaster, and I think one brakeman on front of the engine.

Ques. Where did Smith get on the engine?

Ans. At the coal yard.

Ques. Did you say Smith the yardmaster?

Ans. Yes, sir. Taking charge of the yard that morning.

Ques. You think he got on at the coal yard?

Ans. I think he did. I think he come out from breakfast as I did. I was boarding at that time at the Planters' House.

Ques. Who did you say was on front beside him?

Ans. I think the breakman. I am not sure whether he was or not; would not be positive.

Ques. State whether or not any one got off or on the engine before you left the coal yard.

Ans. I knew Mr. Smith was on the engine, coming over on the engine into the cab.

69 Ques. State whether or not any one got off or on the engine after leaving the coal yard until the accident happened.

Ans. No one got on after it started until after it happened.

Ques. You say there was Moulton and Smith, do you?

Ans. I think there was a brakeman; I would not be positive.

Ques. Do you know this brakeman's name, if he was on there?

Ans. No, sir; I do not.

Ques. What time of day did you say this was?

Ans. About half past six in the morning. I had been down to breakfast, took the engine down there for that purpose, left the engine there at the coal yard, returned, going to work there.

On cross-examination witness testified as follows:

Ques. Where is this coal yard which you speak of having left?

Ans. Between F and G, Fifteenth and Sixteenth streets.

Ques. Mr. Moulton was with you at the time?

Ans. Yes, sir; he left the hotel with me and got on the engine with me.

Ques. How far is that point—the coal yard—from where you first became apprized of the accident; how many blocks?

Ans. About two blocks and a half, I think, from where the accident had happened before I knew of it.

70 Ques. Mr. Moulton was with you in the cab of the engine?

Ans. Yes, sir.

Ques. Mr. Smith, if I understand you, some time prior to the accident was on the front of the engine?

Ans. He came over just about the time we started.

Ques. What engine was this?

Ans. Engine number one.

Ques. Are you acquainted and familiar with different engines made by different persons and the like?

Ans. Yes, sir. I have had a good deal of experience. I have been running an engine about four years and a half up to this time.

Ques. Have you any judgment and knowledge from your experience in regard to the weight of an engine? What sort of an engine was this?

Ans. A Rogers engine, about eighteen (18) tons. It had been frequently overhauled on the Kansas Pacific road. It was an old engine; it was originally a Rogers engine, Patterson, New Jersey, about eighteen (18) tons.

Ques. Was that a light or heavy engine as compared with others?

Ans. A light, broad-gauge engine. She was a light engine.

Ques. What was the character of the bell upon the engine as
71 compared with that of other engines?

(Objected to; not cross-examination. Objection sustained.)

Ques. You say this engine had a footboard at the front end?

Ans. Yes, sir.

Ques. Explain to the jury what this footboard is.

Ans. It is put on for the purpose of brakeman when making couplings, being handy to get off and on. It runs five (5) inches from the rail and is equally as wide as any other portion of the engine.

Ques. Does or does not that foot-board extend each side?

Ans. Yes, sir, three (3) or four (4) inches, about five (5) inches above the rail. There was one at each end.

Ques. Was that foot-board like the other?

Ans. Yes, sir, on the same principle; put on for the same purpose.

Ques. If there were an obstruction upon the track of the road, which part of the engine would first touch such obstruction, let it be running either way?

Ans. If the obstruction were high enough above the rail the foot-board would be first to strike.

Ques. You were running this engine at the time?

Ans. Yes, sir.

72 Ques. What first attracted your attention to this accident?

Ans. Mr. Moulton was on there; told me about it.

Ques. You did not see this man before the accident occurred?

Ans. No, sir.

Ques. At what rate of speed was this engine running at the time of this accident?

Answer. Between four and five miles per hour.

Ques. Was the bell being rung?

(Objected to. Objection sustained.)

Were you then in the employ of the Kansas Pacific?

Ans. Yes, sir.

Ques. I believe you stated in your direct examination when you quit their employ; about fifteen days afterwards?

Ans. Yes, sir.

Ques. Are you in their employ now?

Ans. No, sir.

Ques. What was said to you at the time of the occurrence of this accident? You say that Moulton told you of it; do you recollect what he said?

Answer. He told me that I had killed a nigger down there. I immediately stopped the engine, and we went back.

Ques. Did not Moulton say to you at that time that a man was killed that had fallen or jumped from the other train?

73 Ques. Did not Mr. Moulton say to you that you had killed a man that had fallen or jumped from the other train?

Ans. I don't think he said so.

Ques. Do you recollect your testimony before the coroner's jury?

I think I do. I don't think I ever said that. I don't think that is what Mr. Moulton told me.

Where was this body lying at the time you became first apprized of the accident?

Ans. About thirty to forty (30 to 40) feet north of I street.

Ques. Were there other trains running at this time on other tracks?

(Objected to. Sustained.)

Ques. Are you certain that was all Mr. Moulton said at the time he apprized you of the accident?

Ans. At that time? Yes, sir.

Ques. Did you not testify before the coroner's jury?

Ans. Yes, sir.

Ques. Did you not state before the coroner's jury that Moulton said to you that we had killed a man who jumped off of that train?

Ans. The first he said to me was we had killed a negro.

Ques. The question is whether you did not make that statement before

Ans. No, sir; I don't think I did. Neither one of us knew
74 where he came from, I suppose. I did not.

Ques. I believe you stated you did not recollect the name of the brakesman on the engine?

Ans. No, sir. I am not positive whether he was there or not. I think he was.

Ques. Do you know one Ed. Williams, and was he a brakesman in the employ of the company at that time?

Ans. I don't remember whether he was or not.

Ques. Did you testify before the coroner's jury in regard to this matter?

Ans. Yes, sir.

Ques. When?

Ans. The same day.

Ques. And in reference to what matter—the killing of this man Twombly?

Ans. Mr. Twombly; yes, sir.

Ques. That was on July 1, 1872?

Ans. Yes, sir; I think it was on the first. I won't be positive about the day of the month; the same day when the accident occurred, in the afternoon.

On re-examination witness testified as follows:

Ques. You say you are not in the employ of the Kansas Pacific at this time?

Ans. Yes, sir.

75 Ques. Are you in the employ of another road?

Ans. Yes, sir.

JAMES W. TRUAX, sworn in behalf of the plaintiff, testified:

Ques. Were you acquainted with George W. K. Twombly in his lifetime?

Ans. I was.

Ques. How long have you knew him?

Ans. Since 1867.

Ques. When did you see him last before his death?

Ans. I saw him about one minute before his death; was probably the last that saw him alive.

Ques. How did you come to meet him on that occasion?

Answer. I had been to Mr. Fineman's early in the morning. I met him on the narrow-gauge track. We came together right on the narrow-gauge track on I street. It was on the side of the street down the river, that way towards the depots.

Ques. Was it in the part of the street used for wagons and the like?

Ans. It was; we stopped very near the gutter, betwixt the sidewalk and the street, if there was a sidewalk there.

Ques. State to the jury what you know about that occurrence from the time you met him until after the accident occurred.

76 Ans. I did not see him at the time it struck him. I met Twombly there, and I was going towards the river. I put my hand on his shoulder, as the narrow-gauge train was likely to pass, and caused him to move on to the wide-gauge track, and spoke to him, told him where a certain plow he had spoke to me about the day before, and he spoke for the loan of it to plow out some corn. I don't think I detained him—less than a minute, probably. We had our face toward the depot at the time, rather looking to the hind end of the narrow-gauge

as it passed. That is the situation we stood in. I started, passed along, passed twenty (20) feet, heard an outcry, looked around, saw the other engine had passed and killed him.

Ques. You say that you were looking standing with your face toward the depot and back toward the coal yard. What direction did the Kansas Pacific wide-gauge engine come from?

Ans. From the south toward the depot, going in the direction we were looking.

77 Ques. What direction was the Rio Grande going?

Ans. South.

Ques. And you were looking very near north; you were looking towards the direction the Rio Grande came?

Ans. Yes, sir; watching the hind end.

Ques. You say you don't think you were there a minute talking with him?

Ans. No, sir; I almost kept right along as I passed him. I took him along with me two or three steps. I was in a great hurry.

Ques. When did you first see this Kansas Pacific engine?

I did not see it until after it had run over him.

Ques. How far must you have been from it when it passed you?

Ans. I expect I was twenty (20) feet off from it, as near as I can judge; about four or five steps; because when I left him I was on the run.

Ques. When you heard the outcry and looked back had the Rio Grande train cleared the way?

Ans. I don't think it had quite; very near cleared, if it was not quite.

Ques. Twombly, then, as I understand, was stopped in crossing the street by your putting your hand upon him?

78 Ans. I did not feel inclined to wait as I was in a hurry. I took him along with me to tell him where the plow was.

Ques. Did you hear the Kansas Pacific engine as it was approaching you, coming up the track?

Ans. I did not. I heard no warning of it, with the exception I heard the outcry, the first notice I had.

Ques. Was there any bell being rung upon the Kansas Pacific engine at the time?

Ans. Not that I heard.

Ques. From your position there, can you state whether the bell was rung or not?

Ans. I should think not. The narrow-gauge was ringing their bell. My attention was drawed to the narrow-gauge. I seen and heard nothing of the other until I looked round behind and saw that it had passed.

Ques. Could you have mistaken the Kansas Pacific bell for the Rio Grande bell?

Ans. I don't think I could; because I know there was two bells. They are very easy distinguished apart. I have been to the coal-yard many a time when that bell has been rung there; also noticed the Rio

79 Grande; the sounds of the bells are very different.

Ques. You did not see Twombly when he was struck?

Ans. I did not.

Ques. When you found him, where was he?

Ans. He was, at the time I found him, somewhere thirty or forty feet from where I left him standing still, towards the depot from there, laying betwixt the two tracks, the narrow and wide gauge.

Ques. Did you examine the body?

Ans. I did not. I did not examine the body. I saw the head lay betwixt the two tracks.

Ques. When you first heard the outcry and looked around, was the K. P. engine still in motion?

Ans. It was still in motion, passing on toward the depot.

Ques. Who was this outcry by?

Ans. By boys; two or three, I think.

Ques. Was the body moved after you first glanced around?

Ans. It was not until I left it.

Ques. Moved by the motion of the engine?

Ans. No, sir. I heard the outcry; could not understand what it was; saw Twombly was not standing on the side I was on; stepped back, and as the engine got by, I saw what it was.

80 Ques. How far from the middle of I street was he when you stepped away from him?

Ans. He stood just about as near the division by the dust of what would naturally be used for a sidewalk and street as could be. Got as near as he could not to stand in the gutter.

Ques. How wide are these streets?

Ans. Eighty feet.

Ques. How much is used for a sidewalk?

Ans. Twelve feet. He would be right close the twelve-foot boundary, as near as you could get and not stand over the gutter. He was on the street side of the gutter; the travelled street, where the teams passed.

Ques. At the time you met him he was about to cross, you say?

Ans. We was both walking very fast. I was running when I met him. I took him along—brought him along—because I hadn't only just time to cross forward of the narrow-gauge.

Ques. At what rate of speed was the Kansas Pacific engine moving?

Ans. Not moving very fast; not over three or four miles an hour, I should not think.

Ques. Is the approach of an engine or tender moving at
81 rate of speed quiet or noisy?

Ans. I could not say; the noise of the narrow gauge drowned it.

Ques. You were standing, when you and Twombly met, and were talking, as I understand you—you were standing diagonally, were you not, to the Rio Grande train; were you facing directly up the street or were you facing diagonally?

Ans. We stood our backs almost the way the train was going, rather facing toward the train diagonally, as you speak. Our back was not directly the way the train was going.

Ques. You say you have known Twombly for some time?

Ans. I have since 1867.

Ques. Were you acquainted with Twombly's business capacities and character?

Ans. I had considerable business with him one way and another.

Ques. In what employment was he engaged about that time—what was his general business?

Ans. I think he might be considered as a brick-maker as much as anything. He carried on a great many kinds of business. He moved buildings, I think, dug cellars, farmed, was carrying on McNassar's
82 ranch that year.

Ques. What family had he?

Ans. He had a family.

Ques. Do you know how large a family he had?

Ans. I do not. I know he had three or four; he had a girl thirteen or fourteen years old; whether his or his wife's I don't know.

Ques. What kind of a business man was he? What was his character in that respect?

Answer. A very industrious man, always working, always in a hurry about his business, always in a great hurry, up very early, very energetic.

Upon cross-examination witness testified as follows:

Ques. If I understand you you were going down I street?

Ans. I was. I was going towards the river; that is correct.

Ques. You were going at a very rapid rate?

Ans. I was. I was going a good deal faster than a walk.

Ques. You met Twombly right in the center of the narrow gauge?

Ans. I met him so near I was obliged to remove him. He was coming this way towards Wazee. I was leaving Wazee street, going the other way. That was the situation we met.

Ques. You put your hand on his shoulder?

83 Ans. I took him with me. He did not stop me, because I had barely time to pass forward of the Rio Grande engine.

Ques. How far had you got when you heard the outcry?

Ans. About twenty feet. I only made a halt long enough to tell him where I left the plow.

Ques. Do you recollect anything about that Rio Grande train?

Ans. It was quite a long train. We stood looking at the end of it.

Ques. Was the rear end of the train about to the depot?

Ans. It might not have been as far as the depot. It extended that way considerably. The cars on that train were mostly open cars. I don't know as any of them loaded. I did not call my attention particularly to it; was in a hurry, and took very little notice of them, except I noticed it was a long train.

Ques. From the noise and clatter of that train—as I understand, you were looking at this train?

Ans. It made as much noise as trains generally do in passing that way; they passed ringing the bell, and the noise of the wheels made a considerable noise.

W. A. STREET, sworn on behalf of plaintiff, testified as follows:

84 Ques. Did you know Twombly, the deceased, in his lifetime?

Ans. Yes, sir; I did.

Ques. When did you see him last before his death?

Ans. I don't remember now. I did not see him for several days before his death.

Ques. Where were you on the morning of the accident which resulted in his death?

Ans. Standing in my door on Wyncoop street, between Seventeenth and Eighteenth.

Question. What streets were those by the letters?

Ans. H and I.

Ques. About how far were you from I street at the time?

Ans. I should judge about two hundred and fifty or three hundred feet.

Ques. Did you see Mr. Twombly at the time the accident occurred?

Ans. I did not.

Ques. Did you see the Kansas Pacific switch engine number one shortly before this accident occurred?

Ans. I did.

Ques. When did you first see it?

Ans. Directly in front of me, passing along.

Ques. When it passed immediately in front of your premises how far would you have been from it—how far were you from it?

Ans. Sixty or seventy feet; somewhere in that neighborhood;
85 the width of half the street and the side-walk, and about ten feet back from the fence. The train runs right in the middle of the street. I was back in my house, about ten feet from the side walk.

Ques. Which track was nearest your house, the Rio Grande or the Kansas Pacific?

Ans. The Kansas Pacific.

Ques. In what direction was the Rio Grande train going?

Ans. Going the opposite direction of where this one was going. Going towards Cherry Creek.

Ques. At the time that the Kansas Pacific engine passed in front of your premises where was the locomotive of the Rio Grande train?

Ans. It was at H street.

Ques. How long did you continue to notice the Kansas Pacific engine?

Ans. Just observed it in passing, and then went away.

Ques. State whether or not any bell was being rung at the time on the Kansas Pacific engine?

Ans. I did not hear it.

Ques. You say you were about the width of half the street away from it?

Ans. And ten feet back from the sidewalks.

Ques. And this point where it passed you is about two hundred and fifty feet from I street?

86 Ans. This point where the accident is said to have occurred is about two hundred and fifty feet from where I was.

Ques. How far was the engine at the time it passed your premises, from the nearest side of I street; how far from the point where the engine passed your premises to the nearest side of I st.?

Ans. Two hundred and fifty or three hundred feet, I should judge. Probably more or less.

Ques. Your building fronts on Wynkoop street, does it?

Ans. Yes, sir.

Ques. When you first saw the engine how far was it from I street?

Ans. The engine was directly in front of me, consequently it would be half a block, something like.

Ques. About how many feet?

Ans. Just as I said, two hundred and fifty or three hundred feet.

Ques. Was the Rio Grande train ringing a bell?

Ans. Yes, sir.

Ques. If the Kansas Pacific had been ringing a bell would it have been easily confounded with the Rio Grande train, or are they different bells?

Ans. They are different bells.

Ques. What is the difference?

87 Ans. Difference in sound, and the Kansas Pacific is a larger, deeper-sounding bell.

Ques. Had you heard both bells frequently before this?

Ans. Yes, sir.

Ques. Were you looking towards the engine as it passed?

Ans. Yes, sir.

Ques. Was the bell in motion?

Ans. I did not observe that.

Ques. Did you see it?

Ans. I did not observe whether it was or not.

Ques. From the place where you were standing and all would you or not have heard the bell if it had been rung?

Answer. I would have heard it if it had been rung in front of me. I don't know whether I heard it from there or not.

Ques. Was there any other signal given?

Ans. No.

Ques. Did you recognize any one on the engine?

Ans. Not particularly.

Ques. Do you know how many persons were on the engine?

Ans. I do not.

Ques. The Kansas Pacific engine was backing up, I understand?

Ans. Yes, sir.

Ques. Where would the brakesman s place have been on the engine if there had been one on?

(Objected to & sustained.)

88 Ques. Do you know the place of an engineer on an engine?

Ans. Yes, sir.

Ques. Do you know the place of a brakesman on an engine?

Ans. Yes, sir; I believe, though, the brakesman and fireman are one on an engine. In other words, on an engine the brake is right up under the cab, and one fires and brakes both.

Ques. What is the nature of the ground from the point where you first saw the engine up to the point where the accident happened?

Ans. It is almost level.

Ques. A person standing in the engineer's place, the fireman's place, or brakesman's place, was there anything to prevent his seeing an object up along the road on either way?

Ans. Yes, sir,

Ques. What would it be?

Ans. The top of the tender of the engine.

Ques. Would that be so when it was backing up?

Ans. It would if he was standing this way; the engineer, the back of the tender is almost level with his head, consequently he could not see any object.

Ques. How if he was leaning out?

Ans. That would be all right.

89 Ques. There would be no difficulty in seeing out up the track?

Ans. I should think not.

Ques. If the man occupying this position looking behind him had made any effort to see up the track, could it have been without any difficulty?

Ans. I don't know. The engineer generally watches; anybody could look and see; I don't know what the rule is about that. There would be no difficulty about it. I think the engineer would have to have his cab-window open to look out and see anything.

Ques. He would have to have that window open?

Ans. Yes, sir.

Ques. How long had you known Twombly?

Ans. I had known him for probably a couple of years.

Ques. What would have been the opportunities of a brakesman or fireman on here for seeing?

(Objected to and sustained.)

Ques. How long did you know Twombly?

Ans. Probably two years.

Ques. Do you know his character as a business man?

Ans. I knew his general character.

Ques. What was that?

Ans. It was very good; very fair.

90 Ques. I am speaking now as a business man; what was his business?

Ans. Making bricks; kept a wholesale yard there. He seemed to be an industrious, energetic, working sort of a man.

Ques. You say he was an energetic business man?

On cross-examination witness testifies as follows:

Ques. Your house you were then residing in was on the side of Wyncoop; the lowest side?

Ans. Yes, sir.

Ques. Between H and I, and two hundred and fifty or three hundred feet from I street?

Ans. Yes, sir.

Ques. Had you resided there long?

Ans. I had resided there for about two years.

Ques. You were familiar with that locality generally, clear from your house to the depots, and from the depots to the coal yard, and all around there?

Ans. Yes.

Ques. You were familiar with the intersection of I and Wyncoop street, that locality?

Ans. Yes, sir.

Ques. Is there from the lay of the ground any obstruction whatsoever to a full view of both tracks for a considerable distance each

91 way from I st.? I am now placing you at I street. You are familiar with that point. Can you see each track each way?

Ans. Yes, sir.

Ques. How long have those tracks been there, if you know?

Ans. They have been there, one of them, for eighteen months before that, and the other one about twelve, I think.

Ques. Was it a matter of frequent occurrence for trains and engines to pass up and down those two tracks—trains and switch engines?

Ans. Yes, sir.

Ques. Wyncoop street, the center of it at least, was occupied by these two tracks?

Ans. Yes, sir.

Ques. You were standing in your front door this morning at the time you saw these trains passing?

Ans. I was.

Ques. Do you recollect the kind and character of the train of the Rio Grande, which was going toward Cherry Creek?

Ans. It was a very long train; that fact is what attracted my attention to the train, the length of it. Was it, generally speaking, a loaded or an empty train?

Ans. It was an empty train, I think.

92 Ques. Did that train passing in front of your residence and going towards Cherry Creek make a considerable noise?

Ans. It did.

Ques. There was nothing but the switch engine coming up on the track nearest your house?

Ans. No, sir.

Ques. That was going at the rate of three or four miles an hour?

Ans. I would judge so.

State as a matter of fact if your attention was not more particularly attracted to the Rio Grande train by reason of its length and the like of that than to anything else?

Ans. My attention was attracted to the fact of its length, but they were both directly in front of me.

Ques. State whether the conclusions you arrive at now would not be that there was that about the Rio Grande train more calculated to attract the attention of any person than the switch engine?

Ans. I don't remember what I thought at the time.

Ques. As a matter of fact would not a long train going by rather than a switch engine?

Ans. Yes.

93 Ques. The Rio Grande train made considerable more noise and racket than the switch engine, did it not?

Ans. Yes.

Ques. You have spoken in regard to the ringing of bells. I would ask you whether it could not have been—in other words, I understand you to say you did not hear the bell on the switch engine?

Ans. That is what I said.

Ques. Might it not have been that the bell might have been rung and you not heard it; in other words, are you willing to swear that no bell was rung; or do you mean to simply say you did not hear it?

Ans. My very strong impression is that the bell was not rung.

Ques. From what do you draw that conclusion: simply because you did not hear it?

Ans. I believe that is the only reason?

Ques. I presume you have no recollection at all of having looked at the bell of the engine and seeing it stand still, or anything of that kind?

Ans. No, sir.

Ques. You simply draw that conclusion from the fact that you did not hear it, and you think you would have heard it if it had been ringing?

Ans. Yes.

94 WILLIAM HOLLIDAY, sworn in behalf of plaintiff, testified as follows:

Ques. Were you acquainted with Mr. Twombly in his lifetime—George W. K. Twombly?

Ans. I was.

Ques. How long had you known him?

Ans. Since 1861.

Ans. State what opportunities you had for knowing his character as a business man, and ability as a business man?

Ans. I got acquainted with Twombly in 1861 down on what is called the Lupton bottom. I entered into partnership with him on a ranch; was in partnership between three and four years, after which time I sold out to him and came to Denver, and I knew him off and on from that time until he was killed.

Ques. What was his character as a business man?

Ans. He was not a very good manager, but a very hard-working man.

Ques. Were you acquainted with his family at the time of his death?

Ans. Yes.

Ques. With his widow, Mrs. Twombly?

Ans. Yes.

95 Ques. How much of a family had he at the time of his death?

Ans. This was his second wife. I think he had but one child with her, and three boys by his first wife—four in the family.

Ques. Of his own?

Ans. Three of his own.

Ques. All members of his family at that time?

Ans. Yes.

(By the Court.) This child of the second wife was not Twombly's child?

Ans. No, sir; not George Twombly's.

Ques. As to that child of the second wife, state, if you know, who provided for it.

Ans. All I know is, that this girl belong' to the widow when he married her. That is all I know of it. He claimed her as one of the family, of course. She was a very small child when I first knew her.

Ques. How long had they been married?

Ans. I think since 1862 or '3, I ain't sure. I believe "sixty-two," though, the fall of "sixty-two."

Plaintiff rests.

And the defendant, by its attorneys, moved the court for a non-suit of the said plaintiff, for the reason that it did not appear that de-
96 ceased came to his death thro' the negligence of the defendant, and the plaintiff has otherwise failed to make out a case, which said motion was by the court overruled.

And the defendant, to maintain the issue on its part, gave in evidence to the court and jury as follows, to wit:

JOHN E. WALKER, being duly sworn, testified as follows:

Def't examined John E. Walker:

Q. You said that you were going down on this engine to get your breakfast at the Planters' House. I will ask you if that was your main object and purpose in going down on the engine, or was it some other?

A. One of the first things, I went down to the coal-yard to get the empty coal-cars taken in the day before.

Q. For what purpose, aside, did you go down?

A. Generally the first work done in the yard is to go down and clean up Jones and Street's coal-yard.

Q. Did you go down for that purpose this morning—the morning this accident occurred?

97 A. It was as much taking the engine down for breakfast, to do the work, as it was that.

Q. You went down to do what?

Ans. To get the empty coal cars if there was any there.

Q. And your eating your breakfast at that time while the engine was standing there was accidental?

Ans. Went up to the Planters' House to get breakfast to go to work—no coal cars—took the engine over.

Quest. After you got breakfast where did you find the engine?

Ans. Where I left it, at the coal yard.

Q. What, if anything, did you take away from there?
Ans. Nothing but engine, no empty cars in the yard.
Q. Did you know Mr. Smith, the yard master?
Ans. Yes, sir.
Q. Where was he at this time, if you recollect?
Ans. He was boarding at the Planters' House.
Q. Where was he at the time you got on the engine?
Ans. I don't know whether he was on the engine at the time she started or not. He was on the engine before she arrived at H street.
Q. State whether or not in coming from the coal yard you passed through a gate as you passed out of the coal yard with the engine.
98 Ans. I don't remember whether the engine stood inside of the gate or not.
Q. Any gate closed?
Ans. I think not.
Q. Do you recollect who closed these gates?
Ans. I don't remember whether the gates were open. I remember looking in the yard myself when I left the engine there to see whether there were any cars there or not. I don't remember whether gate open or not.
Q. State to the jury in regard to ringing the bell. Was Mr. Moulton on the engine?
Ans. Yes.
Q. You know him?
Ans. Yes, sir; he is master mechanic. I think was taking charge of the shops that morning. He was on the engine when I started. He left the house with me, had some baggage he was taking on the engine, and was ringing the bell from the time we left until she got to I street. Called Smith to see whether should do switching. Just at that instant Moulton turned the bell-cord loose and let Smith in, and almost at the same instant some man said you have killed a nigger.
Q. Where was the engine?
99 Ans. Twenty feet from the crossing of I street, going north.
Ques. Where did this engine start from; what street?
Ans. G; Sixteenth now. It was at that time G st.
Q. What street did it pass over?
Ans. H and I. Stopped before it got to I.
Q. State again so we may understand it.
Ans. We started. The engine stood south of G street. We started in the first place.
Q. How long was the bell ringing from the time she left the coal yard up to what point?
Ans. Up to—well I guess as near as I can recollect about the time the engine was at the south sidewalk of I street. Just about Smith. I asked him if we were going to take coal before we done switching. Moulton opened the cab windows, front window, for him and he came in.
Q. What about the bell-ringing then?
Ans. While Smith came in it stopped the ringing of the bell just as Smith came into the window to let him through.
Q. About how long time was that?
100 Ans. About half a minute; just got a very little over the crossing.
Q. The bell had been ringing continuously up to that time?
Ans. Yes, sir; it is a small bell, an old engine. The engine, I guess, is twenty-odd years old; it is a small bell.

Q. Are you acquainted with the bells upon the Denver and Rio Grande engines—their sound, I mean?

Ans. Yes, sir.

Q. For how long a time previous to this occurrence had you had the opportunity to observe the sound of those bells of the Rio Grande or narrow gauge?

Ans. I have been working in the Kansas Pacific about from February until that time, passing up and down frequently, hearing them frequently, being around in that part of town—living right near the track.

Q. Had you been using this engine in the mean time—the switch engine—running that?

Ans. Yes, sir; off and on. I had had that engine and another one, a larger one.

Q. In regard to this particular engine, switch-engine number
101 one, of the Kansas Pacific, which you were running upon that morning, in regard to the bell of that engine, and the bells in use upon the narrow-gauge engines, state the comparative strength of sound of those bells, the switch engines and the narrow gauge. Have you ever heard the narrow-gauge engine bells during all this time?

Ans. Yes.

Q. You know what the sound was?

Ans. Well, every one could 'l the difference between the two by hearing them.

Q. State what the difference between them was.

Ans. The Kansas Pacific had a very little larger bell. It sounded a little deeper, a very little louder than the Rio Grande.

Q. Speaking about this one engine?

Ans. The sound was a very little louder than those of the Denver and Rio Grande engines. It was very little larger.

Q. You state that you have been an engineer about four years and a
half. Was the difference between the sounds of these two kinds of bells at the time of which you speak such as to attract, in your judg-
102 ment, the attention of what may be called outsiders; not engineers and railroad men?

(Objected to. Objection overruled; plaintiff excepts.)

Ans. I don't know that, take a man, a person not accustomed to it, an outsider a block or two blocks from there would pay any particular attention to it, or notice it, or not—a person, I mean a citizen of the town walking along the street.

Q. Why not?

Ans. I don't think there is any two bells on an engine that runs in the town but what there is a difference of some kind.

Q. Whether in your judgment, from your experience in these matters, whether I or any other person who happened along there at that time would be apt to observe the difference between the tones of these two bells?

(Objected to, overruled, and ex'cn.)

Ans. Of course if you happened along at that time of the accident might have paid a little more attention.

Q. During any other time?

Ans. I don't know whether a man who was not accustomed to
103 them would notice them or not, that was any distance off.

Q. State whether or not there was any strong and decided difference between the tones of these two bells of which we are speaking.

Ans. No, sir; there was no very strong difference.

Q. There was, do I understand you?

Ans. No, sir. There was a difference; the K. P. has a deeper tone, a little, a little heavier bell, not so much difference as there is between that engine and other engines on the same road.

Q. You are now in the employ of the narrow gauge, the Denver and Rio Grande?

Ans. Yes. sir; have been there since the fifteenth of that month.

Q. Is there a difference between the tones of the bells of their engines?

Ans. Yes, sir.

Q. For how many different companies have you worked while you have been engaged in running or assisted in the running of a locomotive?

Ans. Four.

Q. State whether or not during that time you have noticed a uniformity in the sounds of the bells in each road, or a difference in different bells on different engines.

Ans. I never made a practice of it.

Q. Whether the bells are uniform or do they differ?

(Objected to. Objection overruled.)

A. They differ.

104 Q. Do you recollect anything in regard to the noise which was made by this Rio Grande train which was passing?

Ans. No, sir, I do not; did not take any particular note of it. It was a good long train. If I am not mistaken there was two engines on that train.

Q. What can you state in regard to the noise which that train made in passing out?

Ans. I never paid any attention to it; never noticed any difference.

Q. How long a train was it, as near as you can recollect—do you recollect whether it was loaded or empty train?

Ans. It was principally flat cars.

Q. Is there a difference in the sound made by loaded and unloaded trains as they pass along the track?

A. Very little difference. I suppose the loaded is heavier and solid. Empty car may rattle a good deal.

Q. As between the loaded and empty train, which makes the heavier sound?

Ans. The loaded train has a heavier sound, solid; it jars more than an empty train.

Q. Which train makes the loudest jar and clatter and noise, the loaded or unloaded?

105 Ans. An unloaded train.

Q. This engine was backing up, as I understand you?

Ans. Yes, sir; backing north.

Q. Upon which side of the engine as it was backing up did Mr. Smith enter?

A. The left side of the engine, on the east side of the track; that is, this side this way.

Q. Are you enabled to form an estimate of the speed at which a train is moving by looking at it?

Ans. I can come very near it.

Q. That is the result of your experience. At about what speed was the Rio Grande train moving that was passing?

Ans. I did not notice it very particularly. I suppose about five miles an hour. I didn't notice it very particularly; never noticed it particu-

larly enough to know what rate of speed it was going. I had no cause, was not interested in the movement of the train at all.

Q. Then you cannot state the speed at which that train was going?

Ans. I don't know exactly. I suppose about five miles per hour, as near as I can recollect.

Q. Was your engine going about an equal rate of speed, or a little less?

Ans. I think she was going a little less. I don't think she was
106 going very little over four miles an hour, if any—four or five—it would vary—in there somewhere.

Q. Can you state the rate of speed at which switch-engines are ordinarily run?

Ans. As a general thing, the rate is put down for five miles an hour; in some places not so fast.

Q. State to the jury what is meant by the term "switch-engines"; what offices it has.

Ans. Making up trains, doing necessary switching around the yard; making up trains to go out on the road; taking trains that come in; putting in place for loading and unloading.

Q. How far from the depot of the Rio Grande road had the train of that road gone at the time you were passing—do you know where the Rio Grande depot is, having reference to the streets?

Ans. I think I do, yes.

Q. Where is that, so far as streets are concerned?

Ans. Between I and K, I think; It is a block and a half from the D. & R. G. depot. There is a street between where Twombly was killed and the depot.

Q. Is it cut down through a bluff?

A. Yes, sir. It is laid out the same in the center of the street, with the exception of that grading.

107 Q. How far is the Rio Grande depot that way from I street, about where this accident occurred?

Ans. About a block and a half.

Q. Where did you meet this Rio Grande train, near the I street crossing?

Ans. If I am not mistaken, I think their engine had got over the crossing as I got up to the south side; I am not positive about it. There was two engines in the train.

Q. State, to the best of your judgment, the distance you were from I street at the time Mr. Smith came along the running-boards into the cab.

Ans. Just about the time we got into I street, the engine had just about struck the sidewalk, between the gutter by the sidewalk.

Q. I suppose you mean where the sidewalk would be. As a matter of fact there is no sidewalk put down.

Ans. No, sir; none there.

Q. That was the time when Smith went in and when Moulton ceased ringing the bell?

A. Yes, sir; probably that was about half a minute before the accident occurred. I don't think it was more than that, if it was that.

Q. When you speak of half a minute, you don't mean half a
108 minute of thirty seconds; you mean a short space of time?

Ans. I mean half a minute of thirty (30) seconds.

Cross-examined John E. Walker:

Q. How far were you from the crossing of I street when you first

spoke to the yard-master about coming down into the place where you were?

Ans. I suppose about fifty feet from the street when I first spoke to him; he came over on the engine; did not understand what I said.

Q. Did you not have to call him two or three times before he understood what you said?

Ans. He came over on the engine before he could understand.

Q. How would he get around from the point where he was?

A. Running-board for that purpose. He was standing on the footboard in front of the engine, put there for brakeman to use in coupling cars.

Q. What was this man's name that came round?

A. Smith.

Q. Was that the yard-master?

Ans. Yes, sir.

Q. Do you know where he got on?

A. I don't know exactly—between G and H, that was crossing
109 over H street. I spoke to him when he came round and got into the engine.

Q. Did that stop the ringing of the bell?

Ans. Yes, sir.

Q. Did not you have conversation with him occupying two or three minutes before he came around into the engine between you and Smith and Moulton and you?

A. Moulton, I guess, did not see him at all. I hollered at him through the window to know if he would take coal before we done any switching. He did not understand me and came over on the running-board.

Q. How far was Moulton from you; was he behind you or in front of you?

Ans. If I remember correctly he was sitting on the seat and I was standing up.

Q. What was Moulton's connection with the road, if any?

Ans. Master mechanic; took charge of the Denver Pacific shop that morning.

Q. You say you were fifty feet from the I-street crossing at the time he spoke?

Ans. I don't think over fifty (50) feet.

Q. How many lengths of the engine and tender would that have been?

A. I don't remember the exact length of that engine. I guess a little over two. I guess not quite so much.

110 Q. How long would it take him to come to you?

Ans. The same time it would take you to walk the same distance on the floor—no obstructions. I was going to ask him about taking coal; the bell stopped ringing; Moulton told me had run over a man.

Q. Before the accident occurred, before you reached I street, had not this yard-master got out of the cab of the engine before you got to I street?

Ans. No. sir; he was just coming.

Q. In the testimony you gave before the coroner's inquest, Dr. Marix' inquest, in this city, on the day of the accident, did not you state he did not get out again after he came in?

Ans. No, sir.

Q. You are sure you did not?

Ans. No, sir; I did not. If I did I made a mistake.

Q. Would you be apt to remember better then or now?

Ans. There were only two or three there when we got back to where the corpse was.

Q. Moulton, you say, was the master mechanic?

Ans. I think that morning he took charge.

111 Q. How long had he been accustomed to run on that engine?

Ans. They came from the Denver Pacific shops or the Kansas Pacific shops.

Q. He was on there for his own convenience, was he?

Ans. No, sir; he was on there going up to the shops.

Q. Who else was on besides you and the yard-master and Moulton?

Ans. Nobody. I don't know whether the brakeman was on front or not. I won't be positive about that.

Q. How long before you got to the crossing of I street did the bell cease to ring?

Ans. Just about the time the engine got to the crossing—the south side of it.

Q. Was it your general custom to ring the bell or have it rung during the passing back and forth of this switch engine?

Ans. Yes, sir.

Q. Is that a part of the requirements of your position?

Ans. A customary rule; yes, sir.

Q. What particular fact or thing is there that called your attention to the fact that the bell was being rung on that occasion? What is there particularly?

Ans. I know Moulton was ringing the bell.

Q. What is there makes you remember that?

I seen him.

Q. It was customary, you say, for the bell to be rung?

112 Ans. The first thing he grabbed hold of was the bell-rope.

Q. Was there anything particular made you think of it any more than any other thing?

Ans. I don't suppose there was.

Q. Might Moulton not have stopped several times and you not have noticed it?

Ans. I am satisfied he kept it up until Smith came in the cab window.

Q. That is your opinion. You say there was a distinction between these two bells?

Ans. There was a little between that engine and the Denver and Rio Grande, not a great deal; one was a little deeper toned than the other; a little larger, heavier bell, different make. I don't know that if you were going down street you would notice the difference; a man paying attention to it could; they were both small bells.

Q. You don't say that a man paying any attention to trains passing?

Ans. If they watched the trains they could tell the difference.

Q. If they were listening to the bells they could recognize a difference, could they?

A. Yes.

Q. Do you think you recognize the distinction between bells

113 any better than you did before you were in the engineer's business, or do you recognize them as well?

Ans. Well, I know the sound of a bell pretty well.

Q. In the course of your employment you hear a great many bells?

A. Yes.

Q. Do you stop to notice the distinction?

A. No, sir.

Would you not have been more apt to notice them before than since?

Ans. I was raised right alongside of them all my life; was raised right beside a road, in fifty feet of the track, near the line.

Q. You don't notice that you recognize distinctions any better than you did a good many years ago?

A. Well, not particularly; anybody paying attention would notice the difference.

Q. You don't know where Twombly was struck?

Ans. His head was cut off.

Q. Any other parts of his body?

Ans. I don't know.

Q. How long would it take your engine to run from the coal-yard gate up to I street?

Ans. I guess about three or four minutes, probably three minutes.

Q. Would not a man walk that distance in less than that time?

Ans. Yes, sir; about the same.

114 Q. Do you think you run that engine slower than a man would walk? I ask you if you run that engine slower than a walk, than a man could walk?

Ans. A man could walk faster than she was running, a good deal; a man could walk slower.

Q. Do you think a man could walk faster than the Rio Grande train was running?

A. I did not notice; I only noticed there were two engines on the train.

Q. You don't pretend to say how fast it was going?

Ans. I don't think it was going over five miles an hour. They were going south at the time I seen them; I don't know whether they went out of town or not.

Q. Where did you say your engine met the engine of the Rio Grande train; at or very near the I-street crossing?

Ans. If I remember right, I think both struck the south side of the crossing at the same time, the side towards Cherry Creek.

Q. Where was the Rio Grande train when Moulton called to you that a man was killed?

Ans. Gone south; I don't know whether the entire train had

115 passed; when I stopped it had passed; I don't know whether the entire train had passed at the time he spoke.

Q. You swear positively your engine met the engine of the Denver and Rio Grande at I street within how many feet?

Ans. Within ten feet.

Q. You are positive of that?

Ans. I am.

Q. How many cars were in this Rio Grande train?

Ans. I don't know anything about the number of cars.

Q. How much space would it cover?

Ans. I never noticed particularly enough to count the cars. They have got different lengths of cars.

Q. How many lots or blocks?

Ans. A block or a block and a half; I am not positive about the length of the train.

Q. If they were running at the rate of five miles an hour it would take them two to three minutes to cross I street?

Ans. I don't know; I don't know how much train they had; not positive to come to that.

Q. You say you did not talk to Smith at all, before Moulton told you you had run over a man?

Ans. He came in; I hadn't time to look at him; the first thing he said, I think.

116 Q. What was the distance he started to go into the engine-room?

A. On that fifty feet?

A. He only had to walk the length of ten or twelve feet. I understood you to ask how the engine was from the I street crossing; he was twelve or thirteen feet from the cab.

Q. How many times did you call to him before he started?

Ans. I don't think I called only once; he did not understand me; he came over in the cab; I don't know positively how long he stood before the cab window was opened for him to come through; I think Mr. Moulton was sitting on the seat.

Q. You did not have time to speak to him before the accident?

Ans. I think the first word was spoken to me by Moulton.

Q. Did not you say a moment ago you did not have time to speak to him before you was told of this accident?

A. I don't know: probably I did not.

Q. Yet this Rio Grande train had passed a block and a half long?

A. I did not say positively the train was a block and a half long.

117 Q. You said that was about the length?

Ans. As near as I can recollect. I don't know particularly.

Def't called WILLIAM HOLLIDAY. Sworn.

Q. You testified yesterday you were well acquainted with Twombly and had been for some time prior to his death?

Ans. Yes, sir.

Q. Do you know about his stature or height?

Ans. He was a man about my height.

Q. Will you stand up and let the jury see about how tall you are; about what is your height in feet and inches, if you know?

Ans. I am five feet six.

Q. In that height do you make any allowance for boot or shoe heels?

Boot heels, yes, sir.

Q. You are not quite five feet six?

A. No, sir; I don't think I would measure that without these slippers on.

(Plaintiff moved to strike out this testimony as irrelevant. Motion overruled and plaintiff excepts.)

Defendant called STEPHEN J. SMITH. Sworn.

Q. Are you in the employ of the defendant, the Kansas Pacific Railway Company, at this time?

Ans. I am.

Q. Were you in their employ on the first day of July, 1872?

118 Ans. I was in the employ of the Kansas Pacific and Denver Pacific.

Q. In what capacity were you employed for these companies, or either of them, at that time?

Ans. I was in charge as yard-master of all the broad-gauge road: Boulder Valley, Denver Pacific, Colorado Central, and Kansas Pacific.

Q. You were the yardmaster?

Ans. Yes.

Q. State generally what the office and duties of a yardmaster are.

Ans. To see to making up trains and distributing loaded cars as they come into the yard.

Q. You have heard the testimony in this case in reference to the killing of Mr. Twombly, I believe?

Ans. A portion of it, yes, sir.

Q. Were you upon switch engine number one, of the Kansas Pacific, at the time this accident occurred?

Ans. I was.

Q. State when and where you first got on that engine, and all the circumstances at the time you got on. Were you on it at the time the accident occurred?

Ans. I was.

Q. State all the circumstances from the time you got on the engine up to the time of the accident.

119 Ans. After we had got our breakfast at the Planter's House, I went over with my engineer to Jones and Street's coal yard, which is between G & F. Went into the yard to see if there were any empty coal cars I could take up and send out to Boulder or to Erie for coal. There was none. I gave him a signal to back out of the yard. As he backed out I shut the gates of the yard, and then ran and jumped on the foot-board of the engine, in front of the engine, until we passed H, until we got to the middle of the block between H and I, and then E. A. Williams, the switchman, standing with me, said Walker was calling me. This was between H and I, about the middle of the block, I think, and I then started round and walked up on the fireman's side on the engine, on this side, and, I think, I stepped into the cab window, the door in front of the cab that runs out to the running board, about the time we reached the I street crossing. I know I stopped a moment on the running boards as we met the Rio Grande train, about

120 on the crossing of I street, or right near there, where I stopped it. Moulton was on the fireman's side of the engine, with his head out of the window, and as I came up opened the cab window. I just stepped in. I think I had just stepped in when Moulton told Walker that this accident had occurred. We stopped the engine, I should judge, about thirty-five or forty feet beyond the body. All of us stepped down and went back to the body, and then went on with the engine to the yards.

Q. State what you know in regard to ringing the bell.

Ans. Moulton was ringing the bell when it backed out of the yard. Before he started to go he rang the bell as a signal given from the engine asking the man in charge of the work if he was ready to move. I gave the signal to back out. Moulton rang the bell from there up to I street.

Q. Who was Mr. Moulton?

Ans. Fireman of the Denver Pacific shops, in charge of machinery.

121 Q. For how long a time did he continue to ring the bell?

Ans. Until I came into the window at I street, I think, about on the street.

Q. How long a space elapsed between your entering the cab of the engine and the announcement that an accident had occurred?

A. It could not have been half a minute, I don't think. I just stepped down through the cab door onto the foot-board or deck in front of the fire-box.

Q. Who announced the occurrence of the accident?

Ans. Moulton.

Q. State the language in which that announcement was made.

(Objected to. Hearsay, immaterial, does not appear to be anything

more than the supposition of this man Moulton. Objection overruled. Pl'ff exc.)

COURT. It cannot be received to impeach or discredit him.

(Exception.)

Ans. He spoke to Mr. Walker—he said that he had killed a negro—I think that is the language he used—that jumped or fell from the train. I won't say whether he said jumped or fell. I was standing probably three or four feet from Mr. Moulton at the time, right in the gangway.

122 Q. What do you in regard to any other train or trains or engines passing?

(Question withdrawn.)

Q. What other tracks, railroads, were in that vicinity or place?

A. There was the Denver and Rio Grande, and this Boulder Valley.

Q. How many tracks?

A. Two.

Q. What are they commonly termed and designated?

A. Broad gauge and narrow gauge.

Q. From the place of this accident which way and in what direction did these two tracks run?

A. They run up and down Wyncoop street, I believe that is east and west.

Q. What part of Wyncoop street did these tracks occupy?

A. The Boulder Valley, or broad gauge, about the middle of Wyncoop street, and the Rio Grande this side of it.

Q. From what two points do those two tracks run along side by side?

A. They run side by side from I on I about a block and a half from the Rio Grande depot, that is about a block and a half from the other side of I street down near G, probably within fifty feet, then the broad gauge bends a little to go into the coal yard.

123 Q. From G street or thereabout up to the scene of the accident how far is it? How many blocks?

A. It is two blocks and two streets and a few feet over, that is, where the body laid when we first saw the man; probably two blocks, two streets, and some thirty-five or forty feet.

Ques. Do you know the length of the blocks?

Ans. I do not.

Q. Do you know the width of the streets?

A. Sixty feet, I believe.

Q. It is about a block and a half from where this accident occurred, where the body was found, to the Rio Grande depot?

A. About that.

Q. These tracks run side by side from the depot clear down to Jones' coal yard?

A. Yes, sir.

Q. State if there was a train passing at this time upon the narrow-gauge track.

A. There was.

Q. In which direction?

A. Going west, toward Cherry Creek.

Q. From whence had that train started?

A. I can't say anything more than I suppose it started from their depot where they make up the trains. It was coming out of their yard when I first saw it, the Denver and Rio Grande yard, and that is the end of their track.

Q. When did you first observe this train of the Rio Grande or
124 narrow gauge, if you recollect?

A. About the time we left G street, I saw their engine head out going. I could see it very easily on the curve.

Q. What were the relative positions of this train, and of the switch engine which you were upon when you were there at I street, or near there?

A. The greater portion of their train had passed—probably half of it. I should judge passed their engine probably a third of the way from I to H, about that, I should judge. I paid no particular attention to it at the time.

Q. State, if you know, what the character of the train was that was passing out on the narrow gauge.

A. It was freight.

Q. Of what class of cars was it made up?

A. It was a mixed train, the majority of them were empty; there were some cars loaded with timber or lumber, I could not say which, one or two I remember I saw loaded with timber or lumber.

Q. As to box or flats?

A. A number of empty flats in the train.

Q. How long have you been engaged in the operating of railroad engines and cars?

A. Some twelve years.

Q. Is there a difference or not in the sound made by an empty
125 and a loaded train?

A. Yes, sir.

Q. State what that is.

A. An empty train makes the loudest—rattling noise, a loaded train runs still and heavy with a deeper sound.

Q. Would a train of empty box cars make a greater noise than of flats in an empty train?

A. Make a greater noise than a loaded one.

Q. Are you familiar with the sound of the bells upon the engines of the narrow gauge?

A. Yes, sir. I worked up here in the yard something near a year. They were switching in their yard near to us, used to hear them frequently.

Q. Are you familiar with the sound of the bell of switch engine number one?

A. Yes, sir.

Q. Is there a difference between the sounds of the bell of switch engine number one, and the bells upon the Rio Grande engines?

A. Yes, sir.

Q. State what that difference is, to what extent there is a distinction between the sound of the Rio Grande engines, and the ordinary broad gauge engines?

A. This engine number one was a little Rogers engine, I judge about eighteen tons—a little bell, a much finer toned bell than the bells in use on the broad gauge engines.

126 Q. What do you mean by finer toned?

A. Lighter.

Q. Was it switch engine number one you were upon?

A. Yes, sir.

Q. Give us an idea of the difference between these two bells, the Rio Grande engine and the switch engine.

Ans. I don't know that I can describe the difference; there was a

difference in the tone, not as much as there is in the ordinary broad-gauge engine, that is the only engine of this particular make. Most all the manufacturers have different toned bells.

Q. State if the difference between the tones of these two bells was such as, in your judgment, would be apt to attract the attention of people generally.

(Objected to. Objection overruled. Exception.)

Ans. A person standing and listening to the two bells of the broad-gauge engine and Rio Grande engine, and noticing the difference in the tone, paying strict attention would discover the difference.

Q. How would it be in your judgment as to a casual listener?

(Obj'd to. Obj'n overr. Pl'ff exc.)

A. A casual observer would be very apt to notice the difference.

127 Q. Was the bell upon the Rio Grande train being rung?

Ans. Yes, sir.

Q. Was the bell of switch engine number one being rung?

A. It was until I stepped into the cab, about the crossing of I street, and we stopped just after.

For how long a time after the bell upon switch engine number one ceased ringing—about how long a time did it cease ringing before you were apprised of this accident?

A. I don't think it was over half a minute if it was that long.

Q. At what rate of speed, if you know, were these respective trains running—the switch engine and the narrow-gauge engine?

A. The switch engine was running about four miles per hour; we were backing up grade; the Rio Grande was running out on grade, running about five miles per hour; either engine might have varied from that rate of speed, but not but very little.

Q. How long after the announcement of the occurrence was it before the switch engine stopped?

A. I think the engine had not run more than once and a half its length by the body.

Q. What efforts were made to stop it?

A. Mr. Walker throwed the reverse lever ahead, and it stopped itself.

Q. What did you next do after he stopped the switch engine

128 number one?

A. Stepped down. Walked back to the body, myself and Mr. Walker and Mr. Moulton.

Q. Were any persons present at the time you arrived at the body?

A. There was a man came to the body about the same time we did. I don't know which party got there first. I remember a man's coming there and picking up the head.

Q. Describe the position in which the body lay at this time.

A. As this would be the space between the two tracks, this the rail of the broad gauge, the head very near the track, the neck close to the rail, the body extending about in this course, not square across, but with the feet a little this way, the body lay on its back. I think the left hand was cut off. I am quite sure.

Q. The head lay between the broad-gauge rails?

A. Yes, sir. Probably two feet or more from the rail inside, the feet laying a little east of where the neck lay.

COURT. Toward the depot?

Q. Did you observe the bruises and the appearance of the body and clothing of this man?

A. Yes, sir.

Q. Describe them; describe what you observed.

129 A. His head was cut entirely off, and the hand, I think, cut entirely off. His clothing was torn across the body there, and bu*r*ised on the body. I ain't positive. I think on the middle and front of the body.

Q. Do I understand you his clothes were torn across his middle in front?

A. The middle of the body. I think he was bruised about in that position, or that part of the body.

Q. Do you know about what height this man was that was killed?

A. I could not give a positive close estimate. He was an ordinary sized man, I should judge, from the appearance of the body. I never saw the man until after the accident. I should judge he was an ordinary sized man.

Q. Do you know what your height is in feet and inches?

A. Five feet six and one-half.

Q. How high was this man in your judgment as compared with yourself?

(Objected to. Objection overruled.)

A. I cannot say anything definite. I should judge he was an ordinary sized man not far from my size, may be a little taller, may be a little less. I could not say as to that.

Q. What do I understand your answer to be?

130 A. He might have been a little taller or a little shorter. After a man's head being cut off could not form a correct idea. Should judge a medium sized man.

Q. Are you acquainted with William Halliday, the witness on the stand just before you?

A. I know him; yes, sir.

Q. State if you have compared heights with him.

A. He is not as tall as I am.

Q. How long have you been acquainted with switch engine number one, in which you were at the time of this accident?

A. Probably two months before this.

Q. How long since?

A. I used the engine about two months, I think. I then made application to Col. Fisher for a heavier engine, and the engine was returned to the shops,

(Objected to. Jury to disregard what he told Fisher.)

Q. Are you still acquainted with the engine?

Answer. Yes, sir.

Q. Have you been since the accident?

A. Yes, sir.

Q. For how long a time before were you?

A. Two months—about that.

Q. Had this engine what are called footboards?

A. It had.

Q. State to the jury what those footboards are, and where they

131 are placed, what their object and purpose is, how far they project, and all about it.

A. A footboard is a board about from eight to ten inches wide, that extends across behind the engine, on the strap also in front, over the rails, for men to stand on as the engine is running toward them or during switching.

Q. How far each side of the rails do the foot-boards of this engine extend?

A. Some five or six inches. I don't know but more. About that.

Q. Was there a footboard at the end of this engine which was going towards I street?

A. Yes, sir; it was the tender that was that way.

Q. Of what did this engine, as you term it, consist?

A. Boiler, locomotive, and tender.

Q. Which end of it was toward I street as you were going up?

A. The tender.

Q. Was there a footboard across that end?

A. Yes, sir.

Q. And of the character and kind you described? How far did that footboard project b yond the end of the tender, which was in advance as you were breaking up?

(Objected to. Assuming a position and leading the witness to
132 fix a footboard in a certain position.)

A. It stands some eight or nine inches probably.

Q. Does that footboard extend across the track?

(Objected to. Objection sustained. Leading.)

Q. How far did the footboard across the end of the tender project, or did it project beyond the rails?

A. Some five or six inches--in that neighborhood, more or less; as much as that.

Q. If there were anything upon this track, which stood five inches above the rails, which part of engine would be first to strike it when it was backing up?

(Objected to. Objection overruled. Exception.)

A. The footboard would be first.

Q. Suppose a man were standing between the rails on the broad-gauge road, by what would the man have been struck, and in what part of the body? Suppose a man had been standing on the broad-gauge until this engine run against him, where would he have been first struck, and by what?

(Obj'd to as before.)

Q. Suppose a man were standing between the rails on the track
133 of the broad gauge, by what and in what part of the body would he have been struck? Can you judge?

A. A man in an erect position on the broad gauge track, between the rails?

A. If a man had been standing between the rails he would have been struck by the footboard down near his ankles. Footboards are about five or five and one-half inches above the rails.

Q. What would have been the natural position into which a man would have been thrown, and what would have been the effects and the position into which a man would naturally have been thrown by being struck in that way by this engine?

(Objected to. Objection sustained. Defendant excepts.)

Q. Are you acquainted with the height of the flat cars of the Rio Grande train or road?

A. I worked in the same yard, working at their depot. I have been running by them frequently.

Q. Are you acquainted with their height?

A. Yes, sir.

Q. About how high do they stand above the track of the Rio Grande?

A. I can't give it in feet and inches; never measured it; have observed them frequently; come over by them. They would come
134 up about to a man's hips; a man of my size.

Q. Do you know how far these cars project outside of the rails? Do they project?

Ans. About twenty-four inches; they vary in width, as all cars do, probably from twenty-one to twenty-six inches.

Q. Do they project outside of the rail of the narrow gauge road?

A. Yes, sir; their flat cars are their narrowest, and their stock and box cars are their broadest.

Q. In this projection of which you speak, do you take into consideration simply the side of the car, or any other projection that there may be upon the side of it?

A. The stake holders, iron castings, I think would be about twenty-one inches on the flat cars. The stake holders are of cast iron with a wrought-iron band around them to put stakes into them to load timber or lumber on the car.

Q. Do these project from the side of the cars to which they are fastened?

A. Yes, sir.

Q. About how far?

A. I judge about four inches.

Q. What is the shape of these stake boxes or stake holders?

A. Almost square.

135 Q. For what purpose are they?

A. For putting stakes in.

Q. When the car is loaded? About how far apart are these stake boxes?

A. They are different distances on different cars. I should judge about three feet apart. I should judge so; don't know exactly; never measured it.

Q. Do the exterior of these stake-boxes have what we commonly call a round corner, or are they sharp?

A. The corner is not sharp; rounded a little.

Q. They are a little bit rounded—the corner. Of what material are they constructed or made?

COURT. Of cast-iron with a wrought-iron band around them, he said.

Q. Did you see this man before the accident occurred?

No, sir; I did not: not till after he was dead.

Q. Describe the extent to which the tearing of this clothing was of which you have testified.

A. I think it was from about there, somewhere on his hip. I think his pants were unbuttoned. This was torn across here; did not notice particularly; could not say to what extent they were torn, of course, so his body showed.

136 Q. Did he have any other bruises on the lower part of his body below this?

A. Not that I saw. I merely looked at the man a moment and went away, probably only two minutes I stood there.

Q. How in regard to his ankles?

A. I don't know; I did not look at them.

Q. Was the clothing torn below the point you describe?

A. Not that I observed.

Q. Are you acquainted with this particular locality at the intersection of I street with the two tracks?

A. Yes.

Q. How far off from that point can the two tracks be observed each way from that point?

A. You can see the Denver and Rio Grande where they enter the cut where they go across Cherry Creek, just after they cross F, and you can see the broad gauge down to G street, where they go to the coal-yard. The other way you can see the Rio Grande up as far as the depot; should judge a block beyond on the broad gauge.

Q. What obstructions, or are there any, to a plain view of these two tracks, for that entire distance?

A. None, unless there should be a team driving across.

137 Cross-examination of Stephen J. Smith:

Q. You say that you are in the employ of the Kansas Pacific Company?

A. Yes, sir.

Q. You say that there was a man with you by the name of Williams on the front of the engine?

A. Yes, sir, E. A. Williams.

Q. When you say front of engine you mean?

A. Where the pilot would be on a road engine, at the head of the boiler, where the head-light is, and the smoke-stack on top.

Q. About how far were your feet from the ground?

A. About five inches, five and a half.

Q. You were standing on the foot-board, were you?

A. Yes.

Which side of the engine were you on?

A. When I was on the foot-board, I stood almost in front of the boiler-head, in front of the center of the engine.

Q. What were you doing there?

A. I stepped on there to ride up to the yard.

Q. What do you call the part of the engine which runs along in front to clear the way?

A. On road engines it is a pilot.

Q. The foot-board was on this?

Ans. There was a foot-board on each end, on the tender and also in front of the engine.

138 Q. What is this thing you call pilot; describe it?

A. It is a projection extends in front; there was no pilot on this engine; there was a foot-board on it.

Q. This was where the pilot would be on a common engine?

A. On a road engine; yes, sir.

Q. You say you were standing there riding up and down; what was Williams doing?

A. He was standing there; he was one of my men switching for me; I was standing with my face towards the engine facing that way.

Q. Was Williams in the employ of the Kansas Pacific at that time?

A. Kansas Pacific and Denver Pacific; it was his business to switch and couple cars for me, do general switching, what is called yard work.

Q. You say you were looking up towards I street?

A. I was not looking—could not; the boiler was right in front of me; I was standing near the center; Williams was standing on the lefthand side of me.

Q. That would be opposite the Rio Grande track, would it?

A. Yes, sir.

Q. What was he doing, standing there talking?

A. I don't know that he was.

Q. How far were you then from Walker?

139 Ans. Just the length of the boiler, about probably 15 or 16 (fifteen or sixteen) feet, maybe not as far as that.

Q. And to go to that point you would step around the side and walk around?

A. I walked up over the steam-chests, and from that over to the cab alongside of the boiler.

Q. How many times did Walker call you before you went to him?

A. I don't know; I heard some one call my name; Williams said he was calling for me; I heard some one call my name once; I did not start until after Williams told me, because I did not distinguish who was calling me.

Q. How long did it take you to step from where you were to the engine cab?

A. I don't know; it took me a very short time. I stepped on the running board, after I stepped on the side of the boiler.

Q. You stated you thought you were about three hundred feet from I street, at the time you heard Williams call?

A. No, sir.

Q. How far did you say?

A. I said about the middle of the block.

Q. Might it not have been a good deal nearer H street than
140 the middle of the block?

A. I don't think it was.

Q. You think you are familiar with the locality?

A. All I can tell you is about where I passed it.

Q. Did you take any particular notice of it at the time?

A. When I was standing on the board I noticed their engine.

Q. What attracted your attention particularly to the fact that you were then in the middle of the block?

A. I don't know what attracted it; I remember we were about at that point.

Q. Before you started there had not there been considerable conversation about there betwixt you?

A. Williams says "John is hollering at you;" that was Walker.

Q. You are sure that is all that passed, are you?

A. Williams told me Walker was calling. I did not go directly right to the cab; I stopped a moment.

Q. How far is it from I street to the depot of the Rio Grande?

A. A little over a block; maybe a block and a half, a little less maybe.

Q. How far out of the yards had the train got when you first saw it?

141 A. They were betwixt their depot and I street, about half way; I could not form any close estimate; did not pay any attention to it any more than I saw an engine coming up.

Q. How do you come to fix the other distances so much more accurately?

A. I remember walking up there, stopping to look at the Rio Grande engine as it passed me to see if any of the boys were there that I knew.

Q. You were watching the Rio Grande engine, were you?

A. I looked at their engine as it passed me.

Q. You fix definitely the position you were in when Walker first called; why cannot you fix the position of the Rio Grande train where you first saw it?

A. I was at G street.

Q. How fast was their engine running?

A. They were pitching down hill, very little difference in the rate of speed. They were running down pitch; I think a little faster than we.

Q. Where was Moulton?

A. On the fireman's side with his head out of the window; as the engine would be facing that side would be the engineer's side, and this would be the fireman's side.

142 Q. What window do you mean?

A. The side window of the cab.

Q. Which side?

A. That side (southeast).

Q. Could you see Moulton from where you were standing?

A. I could not see either of them; more apt to see Walker.

Q. How do you say Moulton continued ringing the bell?

A. He began at the coal-yard.

Q. Do you know he rang it all the way, if you could not see him?

Ans. The bell rang continuously. I know he was ringing when we left the coal-yard. He was ringing when I went up round. I always noticed if a bell was not ringing, if an engine was running in the city limits.

Q. Were your duties those of an engineer?

A. No, sir; I was in charge.

Q. Your knowledge in that respect is what is acquired from your usual habit?

A. Working with engines I would notice in a moment if a bell would stop ringing.

Q. How do you know Moulton looked out of the window; you say you could not see him?

143 Ans. I saw him when I went up over the running-board; when I walked round upon the running-board, betwixt H and I.

Q. Was he looking towards you as you got in?

A. No, sir; his face was not towards me.

Q. Which way was he looking?

A. Down, kind of back, that way; more back, side of the tank, in that direction; his face was *was* not directed towards me.

Q. How long did you see him before the accident?

A. About the time we were at the middle of the block; about the time I went up over the cylinders or steam-chests, I saw him.

Q. How long do you suppose you were in passing from the place where you started from, to where you stopped, before the accident happened?

A. I could not give you a definite idea. I think I went up on the running-boards between H and I.

Q. How long were you in passing from there to Walker?

A. I could not tell you.

Q. How are you certain you had just got between H and I? How do you come to be so certain in your mind?

A. Because I don't know how that I know, but I know that I do know.

144 Q. You don't know what Moulton was doing before you got up there?

Ans. I did not see him; I heard the bell ringing all the way.

Q. Of your own knowledge you don't know anything about it?

A. Only when I saw him leaving G street, and when I went up on to the running-boards.

Q. When you got around to Walker which side were you on; which side of the engine?

A. I was not to Walker directly. I was in the cab of the engine.

Q. Were you nearer to the Rio Grande track, or further away than Walker was?

A. I was nearer; nearer the middle of the engine than Walker was.

Q. Where was Moulton?

A. He was still nearer the Rio Grande track on that side.

Q. What was the purpose of all this changing around there?

A. Walker's calling me after getting up to the yard; he wanted to know if he should take coal that morning or wait till noon.

Q. That was after the accident?

A. Yes, sir.

Q. You say that the engine was inside of the coal-yard before you started up?

145 A. Yes; that is the front end of it, I think.

Q. You motioned him out and shut the gate; had you and Walter taken breakfast together?

A. Yes, sir.

Q. Did you come from breakfast with the engine together?

A. I don't know. I walked to the engine with him; we started out about the same time. Williams kept house over near there.

Q. Where did you meet the engine of the Rio Grande train?

A. About the middle of the block, betwixt H and I, as near as I can judge.

Q. About the middle of the block the two engines met?

A. Somewhere in that vicinity.

Q. You say this was a mixed train, partly loaded and partly empty?

A. There was some cars of timber or lumber in the train, I don't know how many. It was quite a long train.

Q. You say you have been twelve years engaged in the railroad business; do you take any more notice of bells now than you did ten years ago?

Ans. I am apt to notice a bell. The effect of hearing bells every day—all kinds of bells—is to make you notice them more particularly.

146 Q. Do you think you are peculiar in that respect?

A. I don't know that I am.

Q. You distinguish then the difference in these bells, the switch engine number one and the Rio Grande, very readily, do you?

A. Well, I would distinguish them, I think I would. I might not if I was not paying attention to them; if walking by thoughtlessly any person would be apt to be mistaken if he was not accustomed to it, I think.

Q. How do you know that?

A. I know it from my experience before I commenced railroading.

Q. How do you happen to take such particular note of the effect of bells upon you before you got into the railroad business?

A. I did not notice it so much as I have since I commenced railroading. I could distinguish different manufacturers.

Q. How do you know what effect the sound of bells produced on you twelve years ago? What made you think about that matter twelve years ago so particularly; how do you come to rem'mber that at this time so distinctly?

147 A. I remember after I commenced railroading I could distinguish.

Q. How do you come to remember now what your impressions were before you went into the business?

A. I believe I told you that I did not pay attention to it before, but

after I commenced railroading I could distinguish different manufacturers of locomotives by different sounds.

Q. You conclude that nobody could so distinguish these unless in the railroad business?

A. I should say it is not probable that any person would.

Q. How do you know it?

A. From my own experience since I commenced railroading.

Q. Have you made the question of bell-ringing a specialty?

A. No; never a specialty.

Q. You are willing to swear that a person who had not been in the railroad business would notice distinctions as you would?

A. I don't think they would. I don't swear to it.

Q. That is your professional opinion, is it?

A man would not be apt to notice it.

That is your professional opinion of bell-ringing?

A. Yes, sir, in that line, so to speak.

Q. Have you given the matter of bell-ringing a good deal of
148 thought since this accident happened?

A. I don't think I have. I don't know that I have.

Q. Did you testify before the coroner's inquest?

A. I did not. I went up there, told Marix that I did not see the gentleman, and he said he did not want me.

Q. You say box cars make more noise than flat cars?

A. I think so, yes, sir; that is empty box cars I am speaking of.

Q. Is that an opinion or fact that you swear to?

A. My opinion as a railroad man. Of course the car being closed, the doors being closed, being empty inside would make a greater sound.

Q. In regard to this bell-ringing, you stated this in answer to a question, that a person standing paying attention would notice the difference between the bells; you spoke of a common man then, did you?

A. Yes, sir, a common man.

Q. You say this bell-ringing did not stop more than half a minute?

A. I didn't say a half minute; a short time, just a short time.

Q. How far would you run in half a minute at the rate you were running that morning?

A. I can't tell you exactly.

149 Q. How far do you think; does not your experience assist you in coming to that conclusion?

Ans. Seventy or eighty feet.

Q. Would not you have run one hundred and fifty feet?

A. Might; I don't think we did at this time.

Q. If a man should swear that you run two hundred feet during that time, what would you think?

A. I don't think anything about it, I have no right to judge his opinions.

Q. You may be mistaken?

A. I think I can come within fifty feet of the distance we run from the time I went into the cab until we discovered Mr. Twombly.

Q. Who has the best opportunity of discovering how far you ran, a man on the opposite side of the street or you?

A. I don't know that he would have any better opportunities than we, we were running about our usual rate of speed.

Q. How does that motion come to make so strong an impression?

A. Any railroad man will notice it.

Q. How much slower do you think you were running than usual?

A. We usually run five miles an hour. I don't think we were running five; betwixt four and five.

Q. You think on the distance of two blocks a professional railroad man would appreciate the rate in that distance?

150 A. A man can discover the rate of speed in looking out at the ground very near in running thirty or forty feet.

Q. You were not looking at the ground, were you?

A. Most any man does.

Q. With his face toward the boiler, would he notice the ground?

A. He would be apt to notice the ground on the side.

Q. Would you be apt to notice the ground under such circumstances?

A. Nothing would prevent.

Q. Under the same circumstances, would you notice the sky?

A. If I did not have a hat.

Q. You think the switch engine did not run over its length and a half after the accident?

A. It might have been more or less. I think we stopped in some where between forty and fifty feet. I can't say positive. I did not pay attention strictly how far we did run.

Q. How long was it after Moulton said this nigger had been killed before the engine stopped?

A. Can't tell you, sir, just but a very short time, a moment.

Q. Did you all go back to the body?

151 A. I don't know that Williams did. I don't know but he did. Moulton, myself, and Walker went back.

Q. Did you take particular note how the body lay?

A. It is very distinctly impressed upon my mind how Mr. Twombly lay.

Q. Where did you see the body last?

A. I saw it there, never saw it afterwards?

Q. Where did you see the head last?

A. I don't know whether man picked up the head or not; did not help remove the body; did not handle the body; did not turn it over.

Q. What sort of clothing did Twombly have on, common laboring clothing?

A. I should judge so. There might have been a dozen bruises on his body. I never made any examination.

Q. Was the body on its back?

A. I think it laid with the breast up.

Q. Did you notice to see whether his feet were bruised or ankles?

A. I did not.

Q. Was that rent in his clothes as long as my pencil?

A. Yes, I think it was longer.

Q. You think Twombly was hardly as tall as you are?

A. I am not able to say. I never saw Twombly alive. Should say he was medium height.

Q. You say these flat cars project, including these iron stake-

152 holders about twenty-one inches from their track?

A. I should judge about that; yes, sir.

Q. That is an opinion, is it?

A. Yes, sir; I have measured their stock cars.

Q. What proportion of this train was flat cars?

A. I should judge the greater portion of it. I think there was one or two loaded cars in the train. I am not positive.

Q. Where were they?

A. Near the caboose, in the rear part of the train. I won't say they were, that is my impression, the majority were flat cars.

Q. Was there a caboose attached?

A. Yes, sir.

Q. These box-cars did not have any such iron concern as that?

A. No, sir. The caboose has an iron rail.

Q. I am speaking now of these stakeholders.

A. No, there is none on the box-cars.

Q. You stated, if I remember rightly, that the tracks of these roads were in the middle of Wyncoop street?

A. I think the Boulder Valley or broad gauge is about in the middle of the street.

Ques. The one your engine was on?

Ans. Yes, sir.

Q. I understood you to say they continued in the same position down to near the coal yard?

153 A. The Boulder Valley turns to the right, a little right at G street; turns into the coal-yard.

Q. How many feet the other side of G street does the curve begin?

A. Probably one hundred or one hundred and fifty, more or less. I could not say. It is right near G street.

Q. This street is a public crossing, is it?

A. I suppose so.

Q. In passing up along the track did you notice any one in front?

A. I could not have seen any one on account of the cab. The cab was much higher than my head.

Q. Does it ever become necessary when backing an engine to look out behind you?

A. Of course that is the engineer's business; in case I have cars behind me I always put a man on.

Q. Is this switch-engine so arranged that a person may look out for that purpose?

A. An engineer may look out or see out.

Q. In case you had cars back of the engine, and put a man on the back car, how would the engineer know?

A. He would see by the side; by sight.

Q. What would be the object in putting a man on the other

154 end?

A. In case a car should break off—should break a link—to keep the car from running away.

Q. In case cars were back of the engine, how would an obstacle be seen along the track?

A. By looking by the side, the cab-windows.

Q. Would it not be the duty of the man stationed on the cars to signal to the engineer if an object were on the track?

A. I should expect him to do so, of course.

Q. Is that always done when there is anything to prevent the engineer from seeing up the track; do you always station a man in that way?

A. That was my custom; yes, sir.

Q. Is that the custom of railroads?

A. I think that is the general custom.

Q. Backing up the road in this way with an engine is it the fireman's, breakman's or engineer's duty?

A. It is the man connected with the handling of the engine.

Q. Would the fireman have any such duty?

A. He would be expected to look out for objects.

Q. Is it especially the engineer's duty?

155 A. It is the engineer's place; I believe he is held more responsible.

Re-examination, STEPHEN J. SMITH.

Q. You have spoken of cab-windows; describe how these windows are; are they windows on each side?

A. On the side of the cab.

Q. How about the end?

A. There is a door in the front end, and in the back part of the cab there is a glass window.

Q. Can a person standing in the cab look out of the windows; look up and down the track?

A. Yes, sir.

Q. Do these windows project beyond the sides of the cab?

A. They are broader than the engine, that is, the cab extends a little.

Q. Is there a responsibility and duty attached to all business upon an engine to look out for accidents?

A. There is a general responsibility of handling cars carefully; the engineer is more particularly held responsible for his handling and working of his engine.

Q. State whether in running these trains and engines at a low rate of speed it is at all unusual to see persons standing on the track a little way off?

(Obj'n overruled. Except.)

156 A. We frequently see people on the track at street-crossings in cities.

Q. When you see people standing upon the track in that way, what is the custom; what ordinarily do you do?

(Objected to. Obj'n sustained.)

When you see people standing upon the track in that way what do they do?

(Objected to. Obj'n sustained.)

Do people often stand upon the track in the city limits where switch-engines are running?

(Obj'd to. Sust'd.)

Q. Is it not a frequent occurrence for people to stand upon the track until the engine very closely approaches them before they step off?

(Obj'd to.)

COURT. I think your testimony outside of the limits of their cross-examination.

(Obj'n sustained, and *defendant excepts.*)

Defendant called WILLIAM GILLIS; sworn.

Q. Where did you reside about the first of July, 1872?

A. In Denver, sir.

Q. What was your occupation or employment at that time?

A. I was shipping-clerk for the Denver and Rio Grande Road.

Q. At what time?

A. July.

Q. Where were you on the first day of July, 1872? or do you

157 know at what time this accident occurred, the killing of Mr. Twombly? Do you recollect the time?

A. Yes.

Q. Where were you at that time?

A. At the time he was killed I was in the warehouse. On the morning about that time, a minute or so before he was killed, I was on the front porch of the Denver and Rio Grande office.

Q. Their depot?

A. Yes.

Q. State whether or not at that time a train had pulled out from the yard or depot of the Rio Grande Road.

Ans. It had.

Q. Which way was it going; south, towards Cherry Creek?

Ans. Yes, sir.

Q. What time in the morning was this?

A. Between six and seven.

Q. Could you see any other track running alongside of the Rio Grande?

Ans. Yes, sir.

Q. Could you see it?

A. I could.

Q. How far?

A. Two or three blocks.

Q. Give it by streets. How far that way? What track was it?

A. It was called the coal track; Jones' track.

Q. Broad or narrow gauge?

A. Broad gauge.

Q. From that point where you were standing how far could you see that track extending towards Cherry Creek?

A. I could see it where it entered the coal-yard on G street.

158 COURT. You could see it until it entered the coal-yard?

A. Yes, sir.

Q. Did you on that occasion observe any train or engine on the broad-gauge track?

A. Yes, sir; I saw the switch-engine, number one.

Q. Which way was that engine going?

A. North from Cherry Creek; towards the depot.

Q. Did you observe anything as to the rate of speed at which it was running?

A. I did not notice it that time; did not pay any particular attention to it.

Q. Whereabouts did you last see that engine, if you recollect?

A. It was about midway between I and H streets when I last saw it.

Q. Up to this time did you observe any person standing upon or between the tracks, looking down the tracks as you were?

(Objected to as leading; obj'n overruled.)

Ans. Yes, sir; I saw a man standing between the tracks.

Q. Whereabouts?

A. About the crossing of I.

Q. Do you know who it was?

A. No, sir.

Q. Where was the Rio Grande train that pulled out at this time?

159 A. Well, the forward end of it was, I think, between I and H.

Q. Had it passed the man at the time you last saw him—the forward end of the train?

Ans. It had.

Q. What next occurred after that, so far as you know, relating to your own personal knowledge; where did you go?

A. I was called back into the freight-house, where I transacted business, to either deliver some goods or receive some goods.

Q. Was that the last you saw of the train and this man before the accident?

A. Before the accident.

Q. How long after this did you hear of the accident, then?

A. About three minutes; two or three minutes.

Q. In what way did you hear of it?

A. One of the men that was working for me came in, came rushing in, and said that there was a man killed.

Q. Did you afterwards visit the scene of the accident?

A. Yes, sir.

Q. What did you see at this scene of the accident to indicate it?

(Objected to; overruled; pl'ff excepts.)

A. I seen blood on the ties and a few fragments of flesh.

Q. Where were these indications that you saw?

Ans. They were on the ties that were between I and K.

160 Q. How near to I?

A. I should say it was about ten or fifteen feet from the crossing; not this way, but the other way, towards the depot.

Q. Between the depot and I street?

A. Yes, sir.

Q. About fifteen feet or like that from I, towards the depot.

Q. State how that place where you saw these indications compared as to the place where you saw the man standing you have testified to.

A. I think the man was standing further south.

Q. How much further? State the distance as accurately as you can.

A. About twenty or twenty five feet.

Q. Do you mean towards Cherry Creek?

A. Yes, sir.

Q. Were these indications you saw of blood, shreds of flesh, &c., confined to one spot, or did they extend a distance along?

A. There was spots of blood and pieces of flesh to be seen for about eight feet.

Q. Which way from where you first saw them, between I and K; which way did they extend from where you first saw them?

A. Towards I from where I first saw them.

161 Q. I believe you have stated where this man was standing as relates to the tracks?

A. He was standing between the tracks.

What tracks do you mean?

A. Between Jones' coal yard, the broad gauge and narrow gauge.

Q. Between the broad and narrow gauge tracks?

A. Yes, sir.

Cross-examination of William Gillis:

Q. You say at the time you were called you were at the office, the minute before you were outside. Had the Rio Grande started before you stepped outside?

A. I came from breakfast.

Question. Had the Rio Grande train started out of the yard before you came out of the office? How long before you went into the office had the Rio Grande train started south?

A. A few minutes.

Q. As much as three minutes?

A. More than that; that time or more.

Q. How far is it from the office to I street? The office you were at, your office?

(No ans.)

Where you say you were called in to deliver some freight, or take some freight; how far was that office from I street?

A. About a block and a half.

162 Q. When you were outside there you say you had just been to breakfast?

A. Came from breakfast.

Q. Which way were you going as you went from breakfast to your office?

A. Crossed down from Wazee street to Wyncoop.

Q. Where did you take your breakfast?

A. I think I was boarding at the Planters' House.

Q. Is that this side or the other side of your office?

A. This side. It is nearer G. It is between Wyncoop and Wazee.

Q. Were you moving at the time you first saw this man passing along?

A. Ans. No, sir; I was standing.

Q. How did you come to be standing?

A. Usually stand on the platform around there waiting for the hour of work to come.

Q. Then from that point where you saw the man was about from six to seven hundred feet?

A. In that neighborhood.

Q. Was there any other person near there, near him, at the time?

A. No, sir.

Q. Are you sure about that, or do you simply remember you did not see it?

163 A. If there had been any person near him I should think I would see him.

Q. Was he moving at the time you saw him?

A. No, sir.

Q. Are you very certain about that?

A. Yes.

Q. Do you think there is any probability you could be mistaken about that?

A. I don't think there is.

Q. How far do you say that the switch engine was at that time from him?

A. About a half a block or a little less.

Q. You did not see the body after the accident?

A. No, sir.

Q. Was it not as much as ten minutes, probably, after the accident before you heard of it?

A. No, sir.

Q. You don't think it was?

A. No, sir.

Q. You are willing to swear positively that at the time you saw this man that he was standing absolutely still; are you?

A. Yes, sir.

Q. You can't be mistaken about it?

A. No, sir; I would not say he was not moving his feet about.

Q. He was not in motion?

A. No, sir.

Q. You can't be mistaken about that fact?

A. I don't think that I could.

Q. When did that first make an impression on your mind about his being standing?

164 A. Right away after I heard of his being killed.

Q. It did not make any impression at the time, did it? Would you ever have thought of his being standing if you had not heard he was killed; would you ever have thought whether he was standing or moving?

A. Not unless he had been spoken about.

Q. Is not your knowledge as to that, your impression produced after you heard of his death?

A. It was talked of among parties there, of course, as to what position.

Q. You talked about it a good deal, did you?

A. Yes, sir.

Q. What time did you talk about it; soon after the news came to you?

A. Yes, sir.

Q. Were you before the coroner's inquest?

A. No, sir.

Q. You stated, I believe, at the time you went into the office there, the Rio Grande train had been started out about something over three minutes. Where was the rear end of the train at that time?

A. On the track going south.

Q. Where was the rear end of it, the last car of the Rio Grande

165 train, where was it at that time? At the time you went into the office when you say you were called in there to get some freight, deliver some or something?

A. I think I did not see the hind end of it at all.

Q. Where was it?

A. I think it was still standing in the yard.

Q. How could it still have been standing in the yard?

Ans. They had a very long train. It was in the yard.

Q. How long a train was that; was it a half a block long?

A. It must have been longer than that.

Q. How much longer?

A. I could not tell that.

Q. Have you any idea about its length?

A. No further than what I have heard, that it was a very long train. I was not looking in the direction.

Q. Do you think it was a block long, four hundred and twenty-five or four hundred feet long?

A. I stated before I don't know the exact number of cars they had.

Q. Give your best idea about it.

A. It is more than likely it was longer than a block.

Q. Was it more than a block and a half long?

166 A. I would not be willing to make any positive assertion.

Q. I ask for your best impression.

Ans. It might be a block and half.

Q. It was not over that?

A. I could not say; it might be a block and a half, it might not be so much.

Q. You are in the employ of the Rio Grande road at this time?

Ans. Yes, sir.

Q. Are you accustomed to the making up of trains, and the running of them there have you been?

A. Yes; after; I was not working for the Rio Grande very long at that time.

Q. How long would it take a train of that size to run the distance of a block at the rate that that train was starting out?

(Objected to by def't; not cross-ex'n. Obj'n overruled.)

Ans. Well, it would be all owing to what sort of an engine they had.

Q. Did not you see the engine?

A. I saw an engine.

Q. Were you not acquainted with the engines they used?

A. No. I never handled any of their engines.

Q. I am talking about that train as it was made up there, how long it would take it to run the distance of a block?

167 (Obj'd to. Obj'n overruled.)

Ans. It might take it a couple of minutes or longer.

Q. Did the duties of your position there lead you to take note of freight trains?

A. No, sir.

Q. You say you think when you first saw this man he was twenty-five or thirty feet from where you saw the signs upon the track afterward?

A. That is to the best of my opinion.

Q. You traced the indications back about eight or ten feet, you think?

A. They were scattered about that, I think.

Q. And that would take it back to the northeast line of I st.?

A. About fifteen feet would.

Q. Were you very particular in making this examination?

A. No.

Q. Who else was with you at the time?

A. I can't say whether there was more than two or three.

Q. What time of day was it?

A. Between twelve and one.

Q. You say you don't remember who were with you?

A. I think the yard-master of the Denver and Rio Grande was with me.

Q. Who was that?

A. His name is Hawthorne.

Q. Who else?

A. I could not say.

Q. Was there anybody else?

168 A. Not directly in my company. I don't think there was; there might have been.

Q. Was there any one else present at the time?

A. I don't think I spoke to any person about it, only him.

Q. Was there any one else present at the time?

A. There was nobody in front of me, that is the scene of the accident.

Q. When you made this examination of the track was there anybody else present at the time?

A. No, sir; there was no person present that I know of, no one present but the yard-master and me.

Q. You are sure of that, are you?

A. I think there were some boys right behind.

Q. Did you say you made a particular examination?

A. I did not.

Q. Did you just notice it as you passed along the track?

A. When I first came to the blood I stopped and looked.
Q. How long do you suppose you were there altogether?
A. I don't suppose I stopped more than a minute or so, may be a minute.
Q. What led you to make the examination?
A. Mere curiosity, I think, more than anything else.
Q. These indications might have extended eight or ten feet further back this way into I street, and you not have know' it, might they not?
169 A. No; I don't think they would, because they were plain to be seen a number of days afterwards. I passed there frequently.
Q. Would they be as plain to be seen back on the street where there was travel?
A. Not on the crossing they would not be, unless that the crossing was lined with timber.
Q. You are quite positive, then, that the indications could not have extended back any farther than you said?
No, not quite positive as to the exact number of feet.
Q. It might have been fifteen or twenty, might it not?
A. I believe I made that statement, between ten and twenty.
Q. These indications might have gone back into the street, for all you can swear now?
A. No, I don't think they would.
Q. Are you pretty positive of that?
A. If they had went clean into the street I would be apt to see it.
Q. There had been some travel along on the line of the street, after the accident, before you got there?
A. Yes, sir.
Q. How do you come to be so positive about this, when you seem to be anything but positive in regard to anything about the train?
170 (Objected to. Objection overruled.)
Ans. I don't recollect seeing any traces further than that I have stated.
Q. You did not measure the ground there, did you?
A. No, sir.
Q. Did you step it?
No, I did not pace it off.
Q. It has been two years since then, has it?
A. Pretty near.
Q. Have you ever thought about that question, how far the blood extended, until you were called to the trial here to-day?
A. Yes. I heard talk about it not long ago.
Q. You did talk about it not long ago; who were the men?
A. Smith here, and another party.
Q. What other party?
A. A man by the name of Powers.
Q. Anybody else?
A. Not at that time.
Q. Any other time?
A. I think I spoke to Mr. Sayer.
Q. So you have talked this matter over a great deal?
A. Talked it considerable this past week.
Q. Do you think your impressions now in regard to this transaction are more strong than they were a year ago?
A. A year ago I don't think anything was said about the matter.

Q. Have you strengthened your recollection considerably by these different conversations?

171 A. I don't know as I have strengthened it.

Re-examination of William Gillis:

Q. What are your duties as shipping clerk?

(Objected to, not re-examination.)

My duties at the Rio Grande depot, as shipping clerk at that time, was to receive all goods brought to the depot, deliver any, if there were any in the house for parties in town, transfer the freight from broad-gauge cars to narrow-gauge cars, and transfer the freight if any came south to go east from the narrow-gauge cars to the broad-gauge cars.

Q. Had you anything to do with the making up and handling of trains?

A. Not anything, sir.

Q. Are you acquainted with the distance in feet, or blocks and half blocks, or lots, in particular?

A. I think lots are supposed to be twenty-five feet apart.

Q. When you say a block and a half, have you any particular reference to the number of feet, or just that distance as you observe it with the eye?

(Obj'd to. Objection overruled.)

Ans. Well, I would suppose that a block was something in the neighborhood of five hundred feet.

172 Q. Now I street is how far from the depot, do you say?

A. A block and a half.

Q. When you were standing at the porch there, looking down the tracks, where did you say this engine was, the Rio Grande engine?

A. It was between I and H.

Q. Had or had not the rear end of the train left the yard or depot?

A. I would not state. I was not looking in that direction; the yard is crooked, the part of the train used for making up freight trains, it runs like a Y.

Q. You did not observe the rear end of the train, you don't know where that was exactly?

Ans. No, sir.

Q. Could it have gone far from the depot, the rear end?

A. I don't know the length of the train that they had that morning, except that it was a very long one.

Def't called HORACE S. MOULTON; sworn:

Q. In whose employ were you the 1st day of July, 1872?

A. At that time I resided in Denver, in the employ of the Denver Pacific Railway.

Q. Do you know switch-engine number one?

A. I do, of the K. P. also.

Q. Do you know anything about the movements of that engine

173 on this morning that Mr. Twombly is alleged to have been killed?

A. I do.

Q. Where did you first see that engine that morning?

A. I saw it at the shop first.

Q. Where next?

A. I got on to the engine and went down to the coal-yard; Jones' coal-yard.

Q. Where is that coal-yard?

A. It is situated southwest of G street.

A. When I first came to the blood I stopped and looked.
Q. How long do you suppose you were there altogether?
A. I don't suppose I stopped more than a minute or so, may be a minute.
Q. What led you to make the examination?
A. Mere curiosity, I think, more than anything else.
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Q. Do you know anything about the movements of that engine

173 on this morning that Mr. Twombly is alleged to have been killed?

A. I do.

Q. Where did you first see that engine that morning?

A. I saw it at the shop first.

Q. Where next?

A. I got on to the engine and went down to the coal-yard; Jones' coal-yard.

Q. Where is that coal-yard?

A. It is situated southwest of G street.

Q. Between what streets?

A. West of Wyncoop.

Q. What next was done with that engine, to your knowledge, in regard to the movements of the engine?

A. I stepped on to the engine at the crossing, or rather southwest of the crossing, and the engine started backing up towards the depot.

Q. What crossing do you mean? When you say southwest of the crossing, what street?

A. G street.

Q. You mean at Jones' coal-yard?

A. Yes, sir.

Q. You stepped on to the engine, you state?

A. I stepped on the engine and the yard-master, Smith, I think, gave the signal for them to start backing towards the depot. At all events, the engine started.

Q. Where were you?

174 A. I was standing on the left-hand side, on what is called the deck of engine, on the left-hand side. It is the flooring of the cab in front of the fire-box.

Q. Which way did the engine proceed?

A. It commenced backing up toward the depot, north.

Q. Toward which street or streets?

A. Towards H.

Q. State what you know in regard to the ringing of the bell?

A. I commenced ringing the bell immediately after the engine started. I had hold of the bell-cord in my right hand.

Q. Tell all you know about it up to the time of the accident; go right on, tell the story.

A. We proceeded towards H street, thence up grade towards I, and about one-third ($\frac{1}{3}$) to one-half ($\frac{1}{2}$) the way between H and I we met the narrow-gauge engine. The narrow-gauge train had a double-header, we call it, two engines coupled; a very long train of flat cars, I think it was. About the middle of the block, perhaps it might vary a little either way, I noticed at the time that they had a pretty long train, nearly all empty flats. Between that point and I street, some-

175 where, the yard-master, Mr. Smith, came along on the running-board, or rather the first intimation I had of him was his trying to open the window. He tapped on the cab window to let him in.

Mr. PHELPS. Who did the tapping?

A. Mr. Smith, to secure admission, as a matter of course. I was leaning out of the window of the cab. That was the side window, this was the end window towards the front of the engine. I dropped the bell-cord—I had got to step back or drop the bell-cord to let him in—consequently I let go of the bell-cord perhaps half a minute; he stepped through down to the deck of the engine; I think, stepped back. I immediately resumed my hold of the bell-cord, but I had hardly time to give the bell a tap before I was aware of a man, as I supposed at that time, falling from the——

(Objection.)

My impression was that he fell from the other train; at this time, I should judge, about the middle of the train was opposite me; a long train of empty flats. I was looking in this way rather up over the

176 tender to see the track up above, if I could, farther over. My face was turned that way; at the same time my attention was directed to this passing train; at the time I saw the man distinctly; he appeared to me to fall from the train with arms outstretched; at all

events his feet thrown up in the air. He fell under and a little to the left of me, directly under the driver of the engine, the big driver of the engine itself, not the tender-wheels, not the tender at all; immediately upon seeing this I called to the engineer, "Stop, Walker, you have run over a man who has fallen from the other train;" and immediately afterwards I added, "And I think it is a nigger." The reason why I derived such an impression was (objected to) his face being covered with dust and his hair dark; my impression was it was a negro, his face was very much discolored from the distance that I saw him. That was what made that impression, why I made that remark. The engineer stopped immediately. It ran perhaps twice or three times its length. I
177 stepped off before it fairly ceased motion, and the engineer followed me, and we went back and looked at it. I noticed the head, being severed from the body entirely, lying some distance inside the rail; could not exactly say how far. The left hand, it appeared to me at that time, was partially severed here or somewhere about the wrist. The clothing was torn open as though something had cut it here. Torn open in that manner. There appeared to be a contusion upon the right hip. I did not examine it particularly at all. I then, after merely looking at the body, returned to the engine, and proceeded to the shop.

Q. In backing the engine up, what wheels and how many are ahead of where the man fell in between?

A. There are four truck-wheels on each side, about thirty-six inches in diameter.

Q. What wheels next?

A. There are the large driving-wheels, about five feet in diameter.

Q. Where did the body appear to fall into the engine, as to these?

A. Before them, as they were backing up. It would be to the rear of the driver proper, if the engine was standing still.

178 Q. That would be between the wheels of the tender and the large driving-wheels of the locomotive that he fell, apparently?

A. That was the impression produced upon me at the time.

Q. Describe the position in which you first saw this body.

A. The body appeared to be whirled in the air, rather coming down in this manner, arms outstretched.

Q. Was any portion of it near the ground?

A. No; it appeared to me at that time in the air.

Q. Which was the lowest, the heels or head?

A. The head; that was towards the broad-gauge track.

Q. Was the face up or down?

A. I could not distinguish. I could not swear to it, because it was such a short lapse of time that I could not swear.

Q. How long before you saw this body in the position that you have described, how long before that was it you had ceased ringing the bell?

A. It could not have been over from a quarter to a half a minute. It was a very short time.

Q. At the time that Mr. Smith came into the cab of the engine
179 and from the time you started, what was your position in there? State that again.

Ans. I was standing—supposing this was the cab of the engine here—the fore part of it runs off, meets the boiler. Here is the running-board, running in that direction, alongside of the boiler, nearly up even with it. I was standing this position here, on the deck floor, leaning on the window, with my head out, my right hand hold of the bell-cord.

Ques. When you were leaning out of the window, what was the object and purpose you had?

Ans. I was leaning out of the window to observe the track we were about to pass over in the direction in which we were going.

Ques. At what point on the track, as near as you can judge, having reference to the intersection of the streets, was it where this person went under the wheels of the engine?

Ans. I should judge at the time we were nearing the crossing of I street. I could not tell for certainty.

Ques. Where was the Rio Grande train about that time?

Ans. We were then about midway of the train. I could not
180 judge. It was quite a long train, and the empty cars were abreast of me at the time, some of them.

Ques. After this accident was over, where did you go next?

Ans. The Denver Pacific shops.

Ques. What was your position at that time?

Ans. Foreman Denver Pacific Railroad shops.

Ques. Are these the shops you took the engine to?

Ans. Yes, sir.

Q. Did you make any examination of the engine with reference to the blood the like being upon it after the accident?

Ans. I did.

Ques. How long after, and where?

Ans. Immediately after it stopped at the shops; not more than fifteen minutes, I think, afterwards—probably ten minutes; it may have been more—ten or fifteen.

Ques. State what that examination was and what you saw.

Ans. I saw traces of blood and discolored on the driving-wheels, on the left-hand side of the engine, and the engine truck-wheels, the two wheels in front of the engine. I saw nothing whatever on the tender, no indications.

Ques. You say the left-hand wheels on the side of the engine.
181 Which wheels were those as to the Rio Grande track?

Ans. These where the wheels next the narrow gauge on the left-hand side.

Ques. State how far this tender or any of the attachments to it, if you know, come down to the track or to the rails on the rear of the tender?

Ans. There was what is called a foot-board or step. I was put on there for the purpose of assisting brakesmen in coupling cars to step upon. It reaches within about five inches and a half of the top of the rail, and the board has a heavy oak plank about twelve inches wide, some of them more, some less, not much less. That on the engine was not any less. The one on number one was about twelve inches in width. It extends each side of the rail about ten inches. We usually put them on six feet eight or nine inches in length.

Ques. Does this foot-board or stepping-board, whatever you call it, project beyond the end of the tender?

Ans. It projects beyond everything on the tender connected with the engines at all.

182 Ques. If the engine in backing up met an obstruction, which would be the first part of the engine or tender to strike this obstruction?

Ans. Any object, as for instance a man standing in the track on the rail, the first place in which it would strike him would be, as a matter of course, about five inches from the rail; he would be struck by that (if a man standing in the middle.) A man standing on the track would be struck about five inches above the rail by that foot board.

Q. How does this foot-board extend across the track, square or diagonally?

Ans. Square across; it is put on so, or intended to be.

Ques. How far does it project, as compared with the width of this tender?

Ans. It is about the same width as the frame or body of the tender, perhaps, or might be a little less. I could hardly state positively without measuring; without I measured it.

Ques. In regard to the part of this tender which is underneath, state what there may be there, if anything, and the manner it comes to the track?

183 Ans. Underneath the boxes that hold the journals of the tender wheels there is a brace running fore and aft, or lengthwise with the engine, to connect, the two together, bolted on a pedestal, a cast-iron frame on the frame of the track. These bolts pass through this pedestal to connect this brace on the bottom. These bolts project perhaps three inches above the bottom of the pedestal, and within from five to seven inches of the track on that engine; perhaps it is less than five to the point of the bolts.

Ques. Then the points of these bolts of which you speak come down within five inches of the track?

Ans. Perhaps not as much as that.

Ques. If the tender should run over a person, state whether these points of the bolts would have struck or not?

Ans. They would, most assuredly. Not being of yielding nature the points of these bolts would become more or less entangled in the clothing; that is my experience in railroading, in running over stock.

Ques. How long have you been engaged in railroading?

184 Ans. Twelve or fifteen years.

Ques. In what capacities here?

Ans. One year foreman of Denver Pacific shops; at the present time I am engaged in sinking an artesian well on the Kansas Pacific.

Ques. In what capacity have you been engaged?

Ans. Sup't of repairs. Of motive-power, locomotives particularly.

Ques. Have you seen locomotives frequently after they ran over stock, or the like of that?

Ans. Often. Examined it particularly to ascertain just such things, and to ascertain the nature of any breakage that might occur.

Ques. Have you frequently seen narrow-gauge cars?

Ans. I have. I was employed on the narrow-gauge road several months as engineer and machinist.

Ques. Has your line of business kept you about depots and railroad shops a great deal?

Ans. Not particularly about depots, but railroad shops.

Ques. Have you from your experience had the opportunity of observing the difference, or whether there was a difference between the noise of loaded and unloaded trains?

185 Ans. I have.

Ques. What is that difference?

Ans. A train of empty cars will make more noise and rattle than a train of loaded cars.

Ques. Have you in the same line of employment had the opportunity to observe the tone of the bells of the narrow-gauge cars, and of this switch-engine number one?

Ans. I don't know as I ever had the opportunity of comparing the two together closely, but I know nearly the tone of the narrow gauge, and

that of the engine also. I know nearly the difference if any difference between the tones of the two bells is relative size.

Ques. What is the difference?

Ans. The bells of the narrow gauge are lighter and have less volume of tone that (than) that of that engine number one. Perhaps not any great material difference, that being a very light bell.

Ques. Which makes the sound most likely to attract attention from a casual listener?

Ans. A person's casual attention perhaps might be attracted to the larger bell, possibly, and in the noise of a passing train a person might not distinguish between the two.

186 Q. Are you acquainted with the appearance—could you describe these flat cars of the Rio Grande, of which you speak, so far as to their shape and size?

A. They are a low car. I don't know exactly the distance from the track—in the neighborhood of two feet and a half, I should judge, not less. The empty flat cars haul a row of empty pockets, stakeholders, situated on each side, two or three feet apart, more or less. Those stakeholders project from the side of the car about four inches. Then thereto an iron, or rod rather, running round them, runs through the side of the car, the stringer bolted in that to the side of the car. There is a piece of cast iron with rather sharp corners on top, the bottom is generally rounded a little. There is a groove running round them.

Q. About how far would these caps be above the rail?

Ans. An ordinary-sized man standing would reach up somewhere here—that is when you stand on the track. Some of the cars differ in height, perhaps two or three inches lower than others.

Ques. These flats are not all uniform, then?

187 Ans. No, not the surface; some of them have been more heavily loaded than others, the springs are depressed. They are built uniformly—after being used they are not.

Ques. How far do these flat cars or all cars of the Rio Grande project beyond the rail?

Ans. I should judge about from twenty to twenty-four inches. I never measured any of them.

Ques. State whether or not, in your estimate, you include the projection of these stakeholders. In addition to the side of the car do you include this twenty-one inches?

Ans. No, sir; I think not. I had reference to the platform, the plank of the car. These stakeholders are in addition, with the exception of the planks project a little beyond the stringer, perhaps in some cases a half an inch, perhaps a little more.

Ques. If in backing up this switch-engine number one, a person had been struck by this projecting foot-board at the end of the tender, in what manner would it have thrown him?

Ans. It would have thrown him down, in all probability, into the middle of the track, run over the middle of his body—I have seen
188 quite a number of cases—or under the wheels of the tender, directly, the back part of the engine.

Ques. What probably would have been the effect upon his limbs striking?

(Objected to. Objection sustained.)

Ques. At the time that Mr. Smith entered the cab of the engine, and at time you ceased ringing the bell, how far was the engine and tender from I street?

Ans. I should judge about half the width of this room, forty (40) feet perhaps.

Question. About the width of the room, whatever that may be, was it at that time that you observed this person that you have spoken of?

Ans. Immediately after Mr. Smith stepped on to the deck was the time I first observed him.

Ques. How much time did Smith occupy in stepping in upon the deck, as you call it, of the cab?

Ans. A very short time, a few seconds.

Ques. How many steps had he to take?

Ans. Only one.

Ques. How long, if you know, was this tender?

Ans. It is about eighteen feet, the tender proper. It may be a little less, about eighteen feet.

Ques. State if you have frequently been at railroad crossings
189 in towns and villages, and had the opportunity to observe the people standing upon the tracks and the like?

(Objected to by pl'ff. Objection sustained.)

Upon cross-examination the witness Horace S. Moulton:

Ques. Are you in the employ of the Kansas Pacific Company?

Ans. I am.

Ques. In what business are you engaged now?

Ans. In sinking an artesian well on the line of the Kansas Pacific road.

Ques. In whose employ were you—who hired and paid you at the time of this accident?

Ans. The Denver Pacific Railway.

Ques. Do you know whether or not the Denver Pacific and Kansas Pacific are under one management?

Ans. There (they) were that summer.

Ques. You say you went down to the coal-yard with this engine from the shop?

Ans. I did.

Ques. You got your breakfast, got on the engine at or near the G street crossing?

Ans. Yes; or near it.

Ques. Were you the last one that got on?

Ans. I could not tell you.

Ques. Was the engine in motion when you got on?

Ans. I think not. I would not be positive.

Q. Did you get on in the yard or outside of the coal-yard?

Ans. Outside.

190 Ques. Did you see Mr. Smith close to the doors of the coal-yard, the gate?

Ans. I don't recollect of it.

Ques. Was the engine inside or outside of the yard while you were at breakfast?

Ans. I don't recollect whether it was; the engine might have been partly in the front of it—somewhere near it.

Ques. How far from that was it when you first got?

Ans. I think about the crossing.

Ques. How far is it from the coal-yard gate to the crossing of G street?

Ans. About the length of the engine, I should think.

Ques. Did you ring the bell before you got on?

Ans. I could not do it very well.

Ques. How far had the engine gone before you started to ring the bell?

Ans. I could not tell you; I took the bell-cord immediately on stepping onto the engine, or into it rather, commenced ringing it.

Ques. How far up the street would it have been run when you rang it the first time?

Ans. I could not give you any certain answer to that. It might have been fifteen or twenty feet; it might have been thirty or forty.

Ques. Which side did you get in?

A. On the left-hand side of the engine, next to the Rio Grande track.

Q. Where did you take breakfast?

Ans. At the Planters' House.

191 Ques. Did you go from the Planters' House down to the coal-yard and afterwards to engine?

Ans. I went from my breakfast at the Planters' House directly to the engine.

Q. The Planters' House is on G street just below Wazee?

Ans. It is, I believe.

Ques. In going to the engine as it came down Wazee street, you stood there, did not you; waited for the engine to come along?

I could not tell you positively whether I stood on the roadway and stepped on the tender or not. I would not be positive about that.

Ques. Was your face looking towards I street as you stepped into the engine?

Ans. My face would naturally be west. I could not step into it any other way very readily.

Ques. How did you say you rang the bell?

Ans. I rang it with my right hand.

Ques. How do you know you took hold of the bell-cord with your right hand?

Ans. I have no doubt I did from the position I occupied. I could not very well ring it with any other.

Ques. You have no distinct recollection apart from occupying the position?

Ans. I know that I could not ring it with my left hand.

Ques. That it the reason you say you rung it with your right hand?

Ans. Yes, sir.

192 Ques. You can't swear except from that fact that you rang it with your right hand, can you?

Ans. Yes; I think I can testify that I rang it with my right hand.

Ques. You have a distinct recollection apart from the fact that it was most convenient that you did ring it with your right hand?

Ans. I have.

Ques. How do you remember so distinctly it was with your right hand?

Ans. The first reason is I am not accustomed to use my left hand.

Ques. You say that the engine was one-third of the way between H and I streets when there was talk took place between Smith and Walker, was it?

Ans. I stated that at the time we met the narrow-gauge engine we were about one-third or midway up the block.

Ques. Do you say to let him in you let up the bell-cord?

Ans. I let go of it.

Ques. How many times did you ring the bell before Smith got in there—how many times did you pull the cord?

Ans. I could not tell you; perhaps a hundred times; perhaps not more than fifty.

Ques. How long a time elapsed before you were one-third of the way between H and I?

Ans. It was a very short time.

Ques. About how long should you think?

Ans. It was in the neighborhood of two minutes or two and a half.

193 Ques. Do you know how long it would take you to walk the length of the block from H to I street—an ordinary block?

Ans. No.

Ques. Do you think it is possible you could have pulled the cord fifty times before you got to this point?

Ans. I know I rung it as many times as that. It sometimes requires more pulling than at others.

Ques. Were you talking with Smith and those parties at any time after you got in until you got to I street?

Ans. No.

Question. Did not you say anything at all?

Ans. I don't recollect speaking to any person. In fact there was nobody there to speak to only the engineer.

Ques. How far do you think you ran without ringing the bell after you began ringing it, after you stopped, to the time that this accident occurred?

Ans. Oh, I would not swear positively, but I would think, perhaps, the width of this room.

Ques. How many feet would you say that was?

Ans. About forty, perhaps over.

Ques. Did you testify before the coroner's inquest?

Ans. I did.

Ques. How far did you say it was then, do you remember?

Ans. I was somewhere near the middle of the block, between there and I street. I could not positively testify to the point.

194 Ques. Do you remember how far you said it was before the bell did not ring?

Ans. I don't think I testified to the distance.

Ques. Did you testify to about the distance?

Ans. I think I testified to about the time.

Ques. Do you think you stated there it was about the middle of the block between H and I streets.

Ans. No. I testified that when we met the narrow-gauge engine we were about one-third of the distance, and it was some distance nearer I street than that at the time I ceased ringing it.

Ques. To refresh your recollection, let me see if you don't remember this, that you said you did not know exactly how long the bell ceased to ring, but it might have been for a distance of two hundred feet; is not that about what you said at the coroner's inquest?

Ans. It is so long time since I gave that testimony, I could not say to that.

Ques. Do you think it likely that you said that; that you could not say how long, but thought it might have been a distance of two hundred feet?

Ans. Directly in the middle of the block would probably be two hundred feet, the block is over four hundred feet.

195 Ques. It was somewhere in that neighborhood, was it not?

Ans. Less than that.

Ques. Did you have any conversation with Smith after he came into the cab?

Ans. I don't recollect of speaking to him at all.

Ques. Who called to Smith, you or Walker?

Ans. I presume Mr. Walker; I did not call for him myself.

Ques. Do you know whether he did call to him or not?

Ans. I don't recollect hearing him.

Ques. Did you tell Smith that Walker was calling him?

Ans. I don't recollect that I told him that. It is barely possible that I might have said something of that kind between G and H street.

Ques. You say you noticed this Rio Grande train particularly, did you?

Ans. I noticed it.

Ques. Where did you begin to notice it first?

Ans. I saw the train with the engine of the narrow gauge at the time we left the G street crossing, I should think.

Ques. You could see the engines distinctly?

Ans. I don't recollect whether they were in motion, I think they were.

Ques. When did you begin to notice the train particularly?

Ans. At the time we met it.

Ques. What particular object had you in noticing it so particularly?

Ans. No particular object, only two locomotives passing very
196 close to a person would naturally attract their attention.

Ques. Were you watching for any person on the Rio Grande train.

Ans. No.

Ques. You were not looking to see if any of the boys were on, any body you knew?

Ans. I could not tell who was on the train at all.

Ques. You say you noticed that it was a long train. When did you notice that?

Ans. After we passed the locomotives or about that time.

Ques. Your back was toward the rear of the Rio Grande train, was not it?

Ans. My back, as a matter of course, was from the narrow-gauge road.

Ques. You were facing the same way the Rio Grande train was going?

Ans. No; I was facing directly across or nearly across, rather looking up north; that is, my head was out of the window, my face turned in this direction.

Ques. Was that the way you came to see how long this train was?

Ans. No; not particularly the train passing us.

Ques. About what point had you come?

Ans. About the middle.

Ques. The window was to your left hand?

Ans. The window I was looking out of was rather to the left of me.

Ques. How large a window was it?

197 Ans. Glass about twenty-four by twenty-six, I think.

Ques. How wide is the engine from window to window there?

Ans. I could not tell you exactly.

Ques. How wide do you think it is?

Ans. It was in the neighborhood of seven feet, I should judge.

Ques. Where does the bell-cord come into the engine?

Ans. It comes in at the top of the cab, in the middle or one side. The top of the cab is within two inches of the window or door that leads out on the running-board.

Ques. Which window?

Ans. The left-hand side of the engine, that would be the east side, backing up.

Ques. You stated you observed it was such a long train by looking up to the other end?

Ans. No, I beg your pardon, sir.

Ques. I asked when you first observed how long it was, you said when you met the engine; how could you observe by its passing unless you looked back?

Ans. I observed that it was a long train. I would not state the length. I don't know as I could see the rear of it.

Ques. You made up your mind it was a long train by looking at the engine?

Ans. No, I did not.

Ques. Did you ever see as long a train as that before?

Answer. I presume I have.

198 Ques. Did you ever see as long a one on the Rio Grande road?

Ans. I don't recollect that I have, the exact length of that.

Q. Is it a matter that excites special attention in a railroad man to see a train a block and a half long?

Ans. It might attract his attention for a minute, he would notice it in passing.

Ques. Even if he had been in the business twelve years?

Ans. Yes.

Ques. How many times did you ring the bell after Smith got in, after he came through the window?

Ans. I don't think I rung it at all; I was in the act of ringing it.

Ques. Did you let entirely go of the cord when he came in?

Ans. Yes, I was obliged to.

Ques. You don't think you tapped it at all?

Ans. I would not swear to having pulled the cord sufficiently to make it ring after.

Ques. You are sure you pulled it after?

Ans. I took hold.

Ques. How does that come to make so strong an impression on your mind?

Because as he stepped down I took hold of it and commenced. It was involuntary on my part to resume what I had been doing on

199 being interrupted; I am positive I raised my hand and took hold of the bell-cord.

Ques. Had you been accustomed to doing that kind of work?

Ans. No. Not acting as fireman.

Ques. Had you been accustomed to ringing bells on engines?

Ans. I had done it very often while running; frequently.

Ques. You formed a habit when you let go of a bell to reach and take hold of it again as soon as you can?

Ans. Where it is necessary to ring it; yes, sir.

Ques. Still apart from that you have the distinct recollection that you took hold of the rope?

Ans. Yes.

Ques. Was that an ordinary bell-rope?

Ans. It was a bell-rope that had a knot. It was an ordinary black bell-rope, that is my recollection. I could not swear positively to what it was then.

Ques. Were you on I street when you first saw Twombly?

Ans. I should judge very near it. I could not swear whether on the crossing of I street or not.

Ques. How long did you run after you saw him, what distance?

Ans. We must have run perhaps two or three times the length of the engine. It might have been a little more or a little less.

Ques. You cannot say whether you were on I street or not, or whether you had passed it?

200 Answer. I cannot tell whether we were exactly on the crossing of the street or not, but right near it.

Ques. How far was he from you when you first saw him?

Ans. He was about six feet and a half. Directly under me. When I first saw him he was three and one-half feet below where I was, and he might have been two or three feet to my left; that is, from a perpendicular line.

Ques. How far were your feet from the ground? You was standing, were you?

Ans. I was standing leaning against the window.

Q. How high were your feet from the ground?

A. I don't know exactly the height of the deck of the engine; not on the deck of that engine.

Q. About how high was it?

A. It was in the neighborhood of three feet, perhaps more; it may have been a little more.

Q. How high was it as compared with the height of the bottom of a common car? About the same, or was it higher or lower?

A. There is no great difference, I think, between the deck of that locomotive and any ordinary flat car; there might be a little.

Q. What was the entire length of the engine and tender?

A. I never measured it accurately.

201 Q. What was the length of the engine?

A. I think about twenty-four feet.

Q. Does that include the tender?

A. Oh, no.

Q. You say Twombly was three and one-half feet below you, and about two and one-half feet to your left; was he in front of you or behind you?

A. He was in front and a little to the left.

Q. You mean fronting you as your head was turned out of the window?

A. Certainly.

Q. That would put him a little behind?

A. It would not put him behind my back.

Q. You say that you were facing, for instance, towards Denison, had your head turned out of this window, and Twombly had been opposite place where your feet were for instance?

A. He would have been somewhat in the rear or back a very little, not much.

Q. You said he was in the rear, I believe?

A. To the best of my recollection he was in a state of suspension.

Q. Do you mean by that he was above your head?

A. Hardly.

Q. He could not very well be above your head, and at the same time be three feet and a half below you.

That is probably so.

Well, was he thrown out on his back, on his stomach, or on his side?

202 A. I could not tell you; it occurred so quickly that I could not testify to that.

Q. Were his feet on the ground?

A. Not to the best of my recollection; his head was the lowest.

Q. It was his head that was three feet and a half below you was it?

A. When I spoke of below me, I spoke of about two feet and a half or three feet below me. I had reference to my line of vision.

Q. Was he within your arm's reach if you had your arm out of the window?

A. Not in the position that I stood. The window came about here (shoulder). I was standing inclined towards the window.

Q. Did you see his back or his face?

A. I could not distinctly distinguish then.

Q. Did you see his hands or his feet?

A. I saw his feet, his legs, that part of his body, and his arms outstretched.

Q. And his feet were about three and a half feet below you?

A. I could not say about that; somewhere in that neighborhood; some little distance below me.

Q. Which was the nearest to the rear of your engine; your tender and switch engine, his feet or his head?

A. I think that he came in a little with the first sight I caught
203 of him. In the position he came in his head would be the nearest to the track, but his body had an angle with the track, that way. I could not tell.

Q. I asked you which was the nearest to the rear end of the tender, his head or his feet?

A. I could not say, there might not have been any difference; there might have been a little from his head being lower than his feet.

Q. You don't know whether you saw his back, his face, or his side?

A. I could not distinctly state. I am sure I saw his feet from the fact that they were higher. I saw his arms outstretched. I think I saw them both.

Q. If you saw them both he must have been with his face to the ground, must not he?

A. He might not have been.

Q. You don't remember seeing his hands at all?

A. Not for certainty.

Q. What makes you so certain you saw his feet, when you are not certain you saw his hands?

A. Because his head was more under me, nearer the track than my head and projected over the track a little.

Q. I think you said you did not know that you saw his head at all?

204 A. I said I did not see his face. I cannot recollect distinctly that I saw his face?

Q. That is what you mean, then, by saying that he was in the air. I asked you if that was what you meant by saying that he was in the air? Had he two hands or not when you saw him?

A. I could not tell you.

Q. Do you know whether he lost a hand or not? By seeing him afterwards, after the accident?

A. I noticed one hand was nearly severed when he was lying there.

Q. You say that you called to Walker and told him that he had killed a nigger that jumped off a train?

A. I don't think I made such a statement—those words exactly.

Q. Was that it substantially?

A. My first exclamation was, "Hold on Walker, you have killed a man that has fallen from the other train," and immediately added, "I think it is a nigger," judging from the head which I could see distinctly then.

Q. How loud did you say that? In an ordinary tone of voice?

A. Raised a little the first part.

Q. Was you alarmed?

A. I would naturally be a little alarmed at such an occurrence as that.

205 Q. What was your remark that you called out there?

A. "Hold, Walker, you have killed a man, or run over a man, that had jumped or fallen from the other train."

Q. Did you use both words?

Ans. I don't recollect distinctly whether I did or not.

Q. Do you know whether you said "jumped" or "fallen"?

A. "Fallen," I think, was the word I used. That is my impression.

Q. Do you know you used those words?

A. I am certain I used the expression "has fallen from the other train."

Q. You are sure you used those words?

Ans. That word.

Q. You don't know whether you said "jumped" or not? If he jumped from the other train, what kind of a cab did he jump from?

A. It was a flat car passing, an empty flat. I thought he had fallen from the other train.

Q. Do you think so now?

(Objection. That is for jury to decide.)

Q. Now that you have had time to reflect upon it, do you think so or not?

(Objected to, and objection overruled.)

Ans. A first impression like that is different from reflection.

Q. What is your belief now after reflection?

206 Ans. My impression since after reflection has been that he was hit. My impression now is that he had not fallen from it.

Q. All the impressions that you formed at that time were very indefinite and very unsatisfactory, were they not?

A. They were not.

Q. I' regard to the way and manner that you first saw him and all that?

A. No; I don't think they were indefinite.

Q. You have had no occasion to change them since?

A. Only in that one respect.

Q. Have you thought about the matter a good deal?

A. As a matter of course I would think about it considerably.

Q. On your examination before the coroner's inquest, did you say anything about seeing Twombly in the air?

Q. Have you made different statements of this transaction?

Q. Have you had occasion to make a statement of this transaction to any person before?

Q. State if since this accident happened you have related this transaction, making different statements from what you have made here today.

(Objected to. Objection sustained. Pl'ff excepts.)

Q. You did testify before the coroner's inquest, I believe?

207 A. Yes.

Q. Would your statements made before the coroner's inquest

be more correct than that made to-day—be different from that made to-day or less correct?

(Objected to. Objection sustained. Pl'ff excepts.)

Q. How far were you at the time you first saw this body from the foremost part of the engine?

A. You mean the extreme point of the locomotive?

Q. That is what I asked you.

A. That would be about twenty-two or twenty-three feet perhaps.

Q. You were that far from the front of the engine?

A. I should judge that I was.

Q. How far were you from the driving-wheels?

A. The driving-wheels, the axle, would be almost immediately under me nearly.

Q. Where would the truck-wheels be of which you spoke?

A. The engine truck wheels would be under the front part of the engine.

Q. If you were to speak of driving-wheels you would mean—if you said in front of the driving-wheels, you would mean between that and the front of the engine?

A. It would depend entirely on which way the engine went.

Q. You refer to the position of things on that occasion and
208 speak of in front of the driving-wheels. What do you mean by in front?

A. I mean the side before the wheel if it was rolling in that direction; anything was in front of it here.

Q. What kind of a wheel was that driving-wheel?

A. A large cast-iron wheel, with an iron or steel tire on it.

Q. Would your feet be above the top of that driving-wheel as you stood there in the cab?

A. No.

Q. How far, take it on your body, would the driving-wheels come on the engine as corresponding to your body as you stood there? What is the diameter of that driving-wheel?

A. I think it is about five feet; may be a little more; perhaps a little less.

Q. Then the top part of would be about two feet from the part on which you were standing?

A. It would be in the neighborhood of two feet.

Q. Would it be more or less than two feet?

A. If I knew the exact diameter of the wheel I could tell. I could not state exactly.

Q. Is that wheel directly under you?

Q. It is nearly under me.

Q. When you say nearly, what do you mean?

209 A. I mean that it was; that the center of it would be perhaps nearly under where my body was.

Q. How much would it vary?

Ans. It might vary eight inches; it might have been eight inches to the right, the center of it.

Q. In front of it, do you mean?

Ans. That would be in reference to the motion of the engine back of me.

Q. You mean to say that the driving-wheel would have been in front of the position where you were standing?

A. Relative to the motion of the engine.

Q. Supposing it were standing still, and you were standing where you

were, would the axle of the driving-wheel be in front of you, or would it have been directly under your feet?

A. No; I don't think it would. It might have been in front. I could not tell exactly where my feet were.

Q. When you looked out of the window?

Ans. The upper part of the wheel was under me. It would have been nearly perpendicular under me; perhaps a little in front.

Ques. After you first saw Twombly, you saw his body, was the body coming toward the front of the engine?

210 Ans. It was inclined at an angle a little pitched toward the front of the engine—very slightly. I did not think at the time that it fell exactly at a right angle with the track. It was slightly diagonal.

Q. The train was in motion, was it? The train continued in motion all the time, did it?

A. The engine was in motion.

Q. And he fell from back behind you and towards the rear of the engine, in front then of the driving-wheel?

A. No; he did not fall towards the rear of the engine.

Q. Did you not say he fell in front of the driving-wheel?

A. The engine was moving.

Q. He must have fallen nearer the rear of the engine than you were, did not he?

A. He fell—the fore part of the body might have been a little to the left of me, that is, in front, as you would say of a perpendicular.

Ques. I understand you to say that this driving-wheel is some five feet in diameter, and that you were back from the axle of the driving-wheel; now you say in front?

A. In front, the way it was running.

Q. The body must have been brought some distance nearer the

211 rear of the engine than when you first saw it?

Ans. The motion of the body appeared to be in that direction—the movement of the body appeared to be in that direction.

Ques. The movement of the body must have been towards the front?

A. I could not state as to that.

Q. You say that window came about to your neck—here?

A. When I was leaning over it came about here.

Q. In that position it would be pretty hard for you to get your head out of window, to any considerable extent, and ring the bell at the same time, still with your face and body towards the front of the engine?

A. My body was not facing to the front.

Q. You said your right hand was hold of the bell cord.

A. I was standing leaning out of the window, my right hand raised in this manner. My body was not fronting the front of the engine, as a matter of course.

Q. How many windows are there connected with your part of the cab?

A. There are two windows in the cab, one stationary and one sliding.

Q. Which is the stationary one?

A. The forward one.

Q. What window was it Smith tapped on?

212 A. He did not tap on the window; he tapped on the door.

Q. What door was that?

A. The little door leads out of the cab on to the running-board; that was the door that looked to the front, to the front of the engine.

Q. Did you open that door for him?

A. I reached my hand, turned the latch, opened the door; did that with my right hand after I let go the bell cord.

Q. You are sure you did it with your right hand?

A. I am certain it was the right hand.

Q. Do you have a distinct recollection about that?

A. My recollection is very distinct.

Q. That was two years ago, I suppose. Well, now, when you took hold to open that door did you still continue to look out of the window?

A. I never made any statement to that effect, but my impression is that I remained in the position I was standing, still my head out of the window.

Q. And you let go of the bell cord and opened the door with your right hand, with your head still out of the window?

A. I might have turned my head a little—glanced that way.

Q. Then you caught hold of the bell cord without changing your position?

A. That is my impression.

Q. Did you do it?

213 A. I don't know whether I did turn my head or not. I know I seized it. I might have turned my head, might not.

Q. You say that was a glass door?

A. It was a window; there was a glass in the door-frame.

Q. The door you speak of Mr. Smith came in?

A. Yes.

Q. When you heard Smith tap you knew who it was and what he wanted without turning?

A. I knew somebody wanted to be admitted without looking round.

Q. Was that a signal you had been accustomed to?

A. No.

How did you recognize that was what he wanted so easily?

A. Nobody would be there for any other purpose.

Q. Did you know that at the time?

A. Well, I was satisfied of it, or I should not have opened the door.

Q. Did you take time to reflect about it?

A. I presume, likely.

Q. Are you sure it was Smith came in there at all?

A. Yes; I am sure of it.

Q. Did you see him step in and step down into the engine-room?

A. I could not tell you whether I saw him or not; am not positive whether I turned my head. I know he came in and stepped down and stepped behind me.

Q. You don't know whether it was Mr. Smith or not, do you?

214 Might it not have been Williams?

A. No; I think that I know positively. I was perfectly well aware it was Mr. Smith. I probably might have turned my head a little bit and glanced at him. I might not.

Q. Is that door as wide as one of these doors?

A. Oh, no.

Ques. How wide is it?

A. About eighteen inches wide; perhaps not quite as wide as that.

Q. Have you ever been in there since, in that same place, on that locomotive?

A. I have been on that locomotive often.

Q. Since that time, in the same position?

A. Yes; I don't know as I assumed that exact position or not. I have been riding on the engine after a year and a half after that.

Q. Do you recollect ringing that bell since?
A. I don't recollect any particular time.
Q. You say you let go the rope. Where did you take it again?
A. There is a large knot and handle to prevent it from going through, I don't recollect which.
Q. Do you think you put your hand up to the handle to draw the rope down without turning your head?
A. I might have done it very readily.
Q. Do you think you did do it?
A. I might have turned my head a little, but I think not.
215 Q. The operation had been so mechanical on your part it would not have been necessary?
A. Almost any movement of that kind on a locomotive to a person accustomed to being on a locomotive would come mechanically.
Q. Do you make the statement as to what you did from your idea of what you naturally would do, or from distinct recollection of what transpired?
A. I make that statement that I saw the bell-cord from what I distinctly know.
Q. Then you ought to know whether you put your hand up without moving any?
A. I don't know as that follows as a matter of course.
Q. Which would make the most impression on a man, reaching up for a bell-cord or looking out a window to see if an accident had happened? Which would make the most impression on you?
Q. Have you reflected upon this matter much since the accident occurred?
A. I have thought of it often; as a matter of course I would.
Q. Have you talked of it often?
A. I think not, but very little.
Q. What talking you have done about it, has it been recently or not? If you have talked about it have you done so more recently, or awhile ago?
216 A. I have talked about it some recently, as a matter of course.
Q. Have you talked about it with Smith?
A. Having been subpœnaed as a witness, of course, has brought it to my mind again.
Q. Do you think a casual observer, noticeing the different bells, would have been more apt to have noticed the large bell?
(No ans.)
Q. You say this footboard was about twelve inches wide?
A. You mean the footboard at the rear of the engine that the brakeman stepped on?
Ans. They vary in width from about twelve inches. This particular board was about that, I should think. I never measured it.
Q. How far would it extend out from the track?
A. About ten inches on each side; it might be a little more, in that neighborhood; that was the length of it.
Q. Those bolts you speak of, where do they begin? Did you speak of any bolts except one kind?
A. I spoke of some bolts passing through what we call a pedestal. I spoke of some bolts passing round the stakeholder.
Q. I am speaking about the bolts, not the stakeholders.
217 Ans. The pedestal—commencing at the bottom of what is called the jam of the pedestal; that is an upright frame. I could illustrate to you with a pencil very readily.

Q. Are they between the two tracks or rails—the bolts?

A. Not on the tender; they are outside.

Q. Are they further up, above the tender on the rest of the engine; are they between the two rails?

A. They are outside of the rails a little.

Q. How close to the ground do they come now?

A. On that engine I think they are within five inches; they may be a little less; sometimes they are longer, sometimes shorter.

Q. How far up along the engine, the front of it, do they extend?

A. They extend the length of the two trucks; one truck has two axles, that is, independent of the other one, two more that is independent of the other one. The space occupied by them I don't know exactly.

Q. What I want to know is this: how near do they extend to the front of the engine; how far is it from the front of the engine the first one of these bolts?

A. I' (it) might be twenty-six (26) or twenty-seven (27) or more feet.

218 Q. How many of these bolts are there on a side?

A. Eight (8.)

Q. What do they do?

A. They support the brace at the bottom of the truck frame to prevent them spreading.

Q. Suppose that a man had been standing in the middle of the wide-gauge track and been struck and knocked out to one side, would the bolts have touched him at all?

A. If there had been any depression of the track to have carried him off—probably would not—outside of the ties, making it lower ground.

Q. Suppose he had been struck and the engine run over him, in that case would the engine have torn his clothes?

A. If he had been run over by the wheels of the tender.

Q Suppose the body was under the locomotive?

A. If only run over by driving-wheels first, of course it would not.

Q. Suppose he were between the two tracks and the tender were to run over him, would these things touch him?

A. A man might be lengthwise between the wheels, and the bolts would not injure him at all.

219 Q. Suppose he had been struck by the footboard standing near the track, and give a spring and it had jarred him, so as to push him off, would these bolts have touched him?

A. It would be a matter of difficulty to say anything about that. You could only give a man's impression as to how a body would fall; something I could not say.

Q. If he was struck and knocked from the track outside. do you mean it would depend on all these things as to whether these bolts would interfere with him or not?

A. It would depend on whether he was thrown completely from the track or not somewhat. If he was thrown immediately on the track it would be different.

Ques. How would it be if he was struck by the foot-board and standing just off the edge of the track, and fell backwards?

A. If he had been struck by the foot-board, the most natural position would be to have fallen on the track, and those wheels ran over him.

Q. If he had been struck by the foot-board, standing near the track, not on it, and fallen backwards, state whether these bolts would have touched his clothes or body?

220 A. That would depend on the distance he had stood from the track.

Q. It is possible that it might have been so, and he not have been touched by the bolts?

Ans. There are various possibilities you might assume.

Q. You say you never compared these bells particularly, yours on the switch-engine and the Rio Grande?

A. I never compared them side by side.

Q. Do you know the difference in sound?

A. I know there is a difference in size certain; the difference in sound I could not state distinctly what it was.

Q. Do you recognize distinctions in sound easier than you did twelve years ago—sound of bells?

(Obj'd to; obj'n overruled.)

A. I don't think time would make any difference.

(Here the witness was shown a certain paper writing, purporting to be a copy of the evidence taken at the coroner's inquest.)

A. I should think it was—might be a copy.

Q. Do you know your handwriting when you see it?

A. I do as a general thing. It looks very much like it, but a man can not always swear to his own signature. It might possibly be my
221 signature. It looks very much like it. I cannot say distinctly whether I signed it on that paper or not. The testimony given at that time was read over and I signed it.

Q. Did you ever sign any other statement of testimony besides that one?

A. I believe not.

Q. Is this your signature?

A. I attached my signature to a statement of that kind. I think that is my signature.

Q. Is there anything in this statement here about your seeing Twombly in the air?

(Objected to.)

Q. If this is the statement that you made before the coroner's inquest—you state that you made a statement there and signed it—that was on the day of the accident, was it?

Ans. Yes, sir.

Q. In regard to this body, did you make any examination after you saw it on the track?

A. I simply looked at it.

Q. Did you go away before it was removed?

A. I stepped up to it and looked it over. I did not touch it at all.

Re-examination. MOULTON:

Q. You stated that your impression at the time was that this man whom you saw had fallen from the other train?

222 A. It was.

Q. You so stated that your impression since that time or belief had changed; state what your present belief is, on reflection, upon the whole matter.

(Obj'd to.)

Q. What are your present impressions in regard to it?

(Obj'd to.)

Q. At the time that you saw the body of this person suspended in the air—as I think you mentioned it, and apparently falling from the other train—before that body reached the ground did you get off with a

tape line and measure how high his heels were from the ground; did you do anything of that sort?

Ans. I did not.

Q. Did you observe whether he had his boots or shoes on?

A. I could not tell distinctly.

Q. Do you know whether he had on a white shirt or a colored one?

A. Indeed I do not.

Q. Did you observe the little finger of his left hand or anything of that sort.

A. I could hardly have done so.

Q. Did you observe matters of detail concerning which you have been cross-examined?

A. There are a number of them it would be impossible to
223 observe under the circumstances.

Q. In speaking of the front of the engine, as the engine was going which was the front proper?

Ans. The front proper of the engine would be the rear end at that time, while in motion in the direction in which we were going.

Ques. Was the front towards Cherry Creek or away from it?

A. Towards Cherry Creek; that was the front proper.

Q. The engine was backing up?

Ans. Yes.

Defendant rests.

Pl'ff, in rebuttal, offered in evidence the statement of Moulton before the coroner's inquest, for the purpose of showing that the statements made to-day were not made then.

Defendant objected to the paper upon the ground that the attention of the witness had not been called to any particular statement in the paper: that he had only been asked as to his signature, which objection the court overruled, and allowed the said statement to be read and introduced in evidence, which said statement is in words and figures as follows, to wit:

"HORACE S. MOULTON, being duly sworn, says:

224 "I reside in Denver, and am foreman of the shops of the Denver Pacific Railway. I was on switch-engine number one of the K. P. R. at the time Mr. Twombly was killed. Mr. Walker, the engineer, was with me, also Mr. Smith, the yard-master, was also aboard when we started, on the front end of the engine. No fireman was aboard. The accident occurred about or near the crossing of I and Wynkoop streets. This was the first trip I made on the switch-engine for several months. After we left the coal-yard I rung the engine bell between G and H streets to about the time we met the Rio Grande train going south. We met the train about a third of the distance between H and I streets. Mr. Smith came in on the left-hand side of the engine, and as he came through I stopped ringing the bell to let Mr. Smith come in. Just as I was about ringing the bell again I noticed a man falling from the other train, as I supposed. I told Mr. Walker and he stopped the engine. We went back, and the man was dead. Regulations are to ring the
225 bell at all crossings."

The foregoing was all the evidence introduced on the trial of this cause.

And thereupon the court gave to the jury the following instructions, to wit:

The jury can find no fact involved in the question of defendant's guilt

or innocence except upon the testimony heard. Where the testimony of witnesses conflicts you are to resolve the doubt thus engendered by considering to which of these witnesses so contradicting each other you ought to accord the greater credit. You should consider which of the witnesses had probably the better reasons of observing the occurrence as to which they differ; which probably had the more occasion or reason to observe the matter at the time; which probably had the better memory, so far as this can be judged from their testimony; which was probably most impressed by the circumstances attending the alleged accident, and had the greater reason to bear in memory what
226 he observed; which, if either, has probably any reason to favor in his testimony either party; and which, if either, delivered his testimony with the greatest appearence of candor and impartiality.

Referring to these standards of credit and other like considerations which will perhaps occur to you, you may probably resolve all conflict in the evidence so as to come at the truth, so far as developed by the testimony heard before you. Where the testimony appears to you to rest on equal balance, those speaking for the plaintiff being of equal credit with those speaking for the defendant, you may resolve the question by considering upon whom is the burden of proving the fact in question.

Where the burden of proof rests upon the plaintiff to establish a particular fact, this requires her to produce a preponderance of proof in her favor as to such particular fact, and if she produces no
227 more testimony to maintain the existence of the fact in question than the defendant has produced against it, the fact cannot be said to be proved, and you must, as to such fact, find that it does not exist.

And so as to all those questions the burden of proof as to which rests on the defendant, if defendant produces no more evidence than that produced by plaintiff, you must find the particular question for the plaintiff.

The burden of proving that the deceased came to his death by the act of defendant, that he was first struck by defendant's train, and that the casualty occurred through the negligence of defendant's employees, is upon the plaintiff; and if you think the testimony tending to show that this was the manner and occasion of his death is entitled to precisely the same credit and consideration as that which tends to different conclusions, and no more, you should find for the defendant.

228 If you resolve these questions, however, in favor of the plaintiff, then the next question is as to whether the deceased was guilty of any negligence which contributed to occasion his death; and upon this the burden of proof is upon the defendant; so that if there is a conflict in the testimony as to any fact bearing upon this question, and the testimony which tends to show such fact seems to you no more convincing and no more worthy of credit and belief than the testimony which tends to the opposite conclusion, you should resolve this doubt in favor of the plaintiff.

I. If you conclude from the evidence that the plaintiff's intestate came to his death by being first struck by the passing train of the Rio Grande Railway Company, and thrown by such collision under the wheels of defendant's engine, as claimed by the defendant, you will find for the defendant. If, however, you should conclude upon consideration of all the evidence that the deceased, George W. K. Twombly, was not
229 struck by the Rio Grande train, but was upon or close to the track of the defendant's road at the crossing of I street, and was first struck by defendant's engine or tender and killed thereby, or was

thereby thrown down and afterwards crushed by the wheels of the engine or tender, you will then consider whether the defendant is or is not chargeable with negligence in occasioning such casualty.

Upon this question the law is as follows: It was the duty of the defendant's employés in charge of the engine to cause the bell thereof to be rung while crossing I street and for a length of time before reaching the crossing, sufficient to give warning to all persons who might be crossing upon that street. It was also their duty to keep a vigilant lookout in the direction in which the engine was moving in order to avoid injury to those who might be upon the street crossing. This was especially so if at the time of crossing I street there was also a train passing upon the Rio Grande track. Considering that the noise of the train passing upon this other track might serve to distract the attention of those passing at the street crossing, a peculiar vigilance was incumbent upon the defendant's emyloyés. But although you should believe that the defendant's employés were negligent in the management of the engine, and that but for such negligence plaintiff's intestate would not have lost his life, yet if the deceased was guilty of any fault or negligence which contributed to occasion his death, the plaintiff cannot recover. Plaintiff's intestate being upon the railroad crossing at I street, or attempting to cross the railroad, was bound to exercise all that degree of care and circumspection which a man of ordinary prudence and caution dwelling in the neighborhood would have exercised under the same circumstances; knowing all that Twombly knew in regard to the frequency or infrequency with which trains and engines were accustomed to pass there upon defendant's railway, and the probability or improbability that trains or engines might pass at that hour, and knowing also of the passing train upon the Rio Grande Railway. The fact that another train was passing upon the Rio Grande Railway added to the necessity of vigilance upon the part of Twombly as well as upon the part of the company.

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231

If the plaintiff's intestate failed to exercise the measure of vigilance and care above set down as required of him, the plaintiff cannot recover. If you find, however, that the plaintiff's intestate was not guilty of negligence contributing to his death, and resolve the other questions in favor of the plaintiff, you will find the defendant guilty, and assess and report to the court the plaintiff's damages.

As the plaintiff's actual damages, you may allow her such a sum as in your judgment, from the evidence before you, would be a fair and reasonable compensation for the loss of the support and maintenance which the deceased, had he lived, would have provided for the plaintiff.

And if you find from the evidence that deceased came to his death by reason of gross negligence of defendant's employés and without negligence on his part, you may allow exemplary damages by way of punishment for the defendant's wrong, proportioned to the circumstances of aggravation or mitigation appearing in the evidence.

232

If the place of the accident was at the crossing of a public street, and if defendant's employés were passing the street crossing without ringing the engine bell, or without keeping a lookout in the direction in which they were going, this was gross negligence.

If you should come to a verdict during the recess of the court, you may reduce it to writing in the following form, if for the plaintiff:

LOUISA TWOMBLY, ADMINISTRATRIX,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.

We find the said defendant guilty, and assess the plaintiff's damages in dollars.

Or if you find for the defendant, then in the following form:

LOUISA TWOMBLY, ADMINISTRATRIX,
vs.
233 THE KANSAS PACIFIC RAILWAY COMpany.

We find the said defendant not guilty.

After reducing it to writing, let one of your members sign it as foreman, seal it up, and deliver it so sealed to the bailiff who has you in charge, and you may then separate, to meet the court on to-morrow morning at nine o'clock.

During your separation you will not announce or make known your verdict, or your individual opinion, or the opinion of any of you, to any person *where*soever, nor hold conversation with any person touching this cause.

To the giving of each and all of which instructions the defendant, by its counsel, then and there objected.

And the defendant, by its counsel, then and there asked the court to give to the jury the following instructions, to wit:

"If the jury believe from the evidence that the accident complained of by the plaintiff herein was the result of the fault or negligence of George W. K. Twombly, the deceased, or the fault or negligence
234 of both the defendant and the said deceased, without any intentional wrong on the part of the defendant, then the plaintiff cannot recover.

"If the jury believe from the evidence that the deceased, George W. K. Twombly, just before his death, stepped upon the track of the defendant and failed to look up and down said track for approaching engines or trains, and thereby received the injury or injuries that resulted in his death, then the jury will find for the defendant."

But the court refused to give these instructions to the jury.

To which decision of the court, in refusing to give the same, and each of them, to the jury, the defendant, by its counsel, then and there objected.

And thereupon the jury rendered a verdict against the defendant.

Whereupon the defendant, by its counsel, then and there moved the court to set aside the verdict so rendered, and grant a new trial of this cause, and filed the following reasons in writing for its motion, to wit:

235 TERRITORY OF COLORADO,
County of Arapahoe, ss:

District court. First judicial district in and for Arapahoe County, of the April term, A. D. 1874.

LOUISA TWOMBLY, ADMINISTRATRIX, ETC.,
vs.
KANSAS PACIFIC RAILWAY COMPANY.

And now comes the said defendant, by Alfred Sayre and Charles W.

Wright, its attorneys, and moves the court to set aside the verdict of the jury in said cause, and to award a new trial therein, because—

1. The court should have sustained each and every objection made by the counsel for the defendant to evidence offered and given by the plaintiff upon the trial of this cause.

2. The court should have overruled each and every objection made by the plaintiff to evidence offered by the defendant but rejected by the court.

3. The court permitted improper evidence on the part of the plaintiff, and objected to by the defendant, to go to the jury.

4. The court refused to permit proper evidence offered by the
236 defendant to go to the jury.

5. The court erred in refusing to non-suit the plaintiff upon the motion of the defendant.

6. The court erred in refusing to give to the jury each and every instruction asked by the defendant, and also in giving each and every of the instructions not asked by the defendant but given to the jury.

(Signed) ALFRED SAYRE,
CHAS. W. WRIGHT,
Def't's Att'ys.

And afterwards, to wit, on the twenty-third day of October, A. D. eighteen hundred and seventy-four, the same being one of the regular juridical days of the September term of said district court, the said court overruled the said motion for a new trial, to which ruling of the court the said defendant, by its counsel, then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this its bill of exceptions, and prays
237 that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made, which is done accordingly this 23d day of October, A. D. 1874.

[SEAL.] (Signed) E. T. WELLS,
Judge, &c.

(Endorsed:) 2518. Louisa Twombly, adm'x, &c., vs. Kansas Pacific Railway Company. Bill of ex. tendered to me this Nov'r 20th, 1874. (Signed) E. T. Wells. Filed January 22nd, A. D. 1875, as of Oct. 23d, A. D. 1874. E. F. Bishop, clerk, by Cha's W. Taylor, D. C.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Edward F. Bishop, clerk of the district court of the first judicial district of the Territory aforesaid, within and for the county aforesaid, do hereby certify the above and foregoing to be a true, correct, and complete transcript and copy of the process, with the return thereto, the pleadings of the parties, the bill of exceptions, the appeal bond, the verdict, the judgment, and all orders of the court had and entered of record
238 in said court in a certain cause, wherein Louisa Twombly, administratrix, &c., is plaintiff, and the Kansas Pacific Railway Company is defendant.

In testimony to the above I do hereby sign my name and affix the seal of said court, at Denver, in said district, this 6th day of February, A. D. 1875.

[SEAL ARAPAHOE COUNTY, DISTRICT COURT, COLORADO.] EDWARD F. BISHOP,
Clerk.

Costs in appeal.

Ent'ng 2 orders, 1.00; filing 2 papers, 20	1 20
App. bond, 1.00; transcript, 447 fol's and c't'f', 67.55	68 55
Total	$69 75

(Endorsed:) G. D. 222. Term No. 92. The Kansas Pacific Railway Company, appellant, vs. Louisa Twombly, administratrix of the estate of George W. K. Twombly, deceased, appellee. Record. Filed February 15th, 1875. Jno. W. Webster, clerk.

239 And afterwards, on, to wit, the 15th day of February, A. D. 1875, there was filed in the office of the clerk of the supreme court of Colorado Territory the assignments of error in the above entitled cause, which are in words and figures as follows, to wit:

Assignments of error.

Supreme court, Colorado Territory, February term, A. D. 1875.

THE KANSAS PACIFIC RAILWAY COMPANY, appellant,
vs.
LOUISA TWOMBLY, ADMINISTRATRIX OF THE estate of George W. K. Twombly, deceased, appellee.

And now comes the said appellant, by its attorneys, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

1. The court erred in overruling the defendant's motion for a nonsuit.

240 2. The court erred in giving to the jury the following instructions, to wit:

"The jury can find no fact involved in the question of defendant's guilt or innocence except upon the testimony heard. Where the testimony of witnesses conflicts you are to resolve the doubt thus engendered by considering to which of these witnesses so contradicting each other you ought to accord the greater credit. You should consider which of the witnesses had probably the better reasons of observing the occurrence as to which they differ; which had probably the more occasion or reason to observe the matter at the time; which probably had the better memory so far as this can be judged from their testimony; which was probably most impressed by the circumstances attending the accident, and had the greater reason to bear in memory what he observed; which, if either, has probably any reason to favor in his testimony either party, and which, if either, delivered his testimony with the greater appearance of candor and impartiality.

241 "Referring to these standards of credit and other like considerations which will perhaps occur to you, you may probably resolve all conflict in the evidence so as to come at the truth so far as developed by the testimony heard before you. Where the testimony appears to you to rest on equal balance, those speaking for the plaintiff being of equal credit with those speaking for the defendant, you may resolve the question by considering upon whom is the burden of proving the fact in question.

"Where the burden of proof rests upon the plaintiff to establish a particular fact, this requires her to produce a preponderance of proof in her favor as to such particular fact, and if she produces no more testimony to maintain the existence of the fact in question than the defendant has produced against it, the fact cannot be said to be proven, and you must, as to such fact, find that it does not exist.

"And so as to all those questions, the burden of proof as to which
242 rests on the defendant, if defendant produces no more evidence than that produced by plaintiff, you must find the particular question for the plaintiff.

"The burden of proving that the deceased came to his death by the act of defendant, that he was first struck by defendant's train, and that the casualty occurred through the negligence of defendant's employés, is upon the plaintiff, and if you think the testimony tending to show that this was the manner and occasion of his death is entitled to precisely the same credit and consideration as that which tends to different conclusions, and no more, you should find for the defendant.

"If you resolve these questions, however, in favor of the plaintiff, then the next question is as to whether the deceased was guilty of any negligence which contributed to occasion his death; and upon this the burden of proof is upon the defendant; so that if there is a conflict in the testimony as to any fact bearing upon this question, and the testimony which tends to show such fact seems to you no more convincing and no more
243 worthy of credit and belief than the testimony which tends to the opposite conclusion, you should resolve this doubt in favor of the plaintiff.

"I. If you conclude from the evidence that the plaintiff's intestate came to his death by being first struck by the passing train of the Rio Grande Railway Company and thrown by such collision under the wheels of the defendant's engine, as claimed by the defendant, you will find for the defendant. If, however, you should conclude, upon consideration of all the evidence, that the deceased, George W. K. Twombly, was not struck by the Rio Grande train, but was upon or close to the track of the defendant's road at the crossing of I street, and was first struck by the defendant's engine or tender and killed thereby, or was thereby thrown down and afterwards crushed by the wheels of the engine or tender, you will then consider whether the defendant is or is not chargeable with negligence in occasioning such casualty. Upon this question the law
244 is as follows: It was the duty of the defendant's employés in charge of the engine to cause the bell thereof to be rung while crossing I street, and for a length of time before reaching the crossing sufficient to give warning to all persons who might be crossing upon that street. It was also their duty to keep a vigilant lookout in the direction in which the engine was moving, in order to avoid injury to those who might be upon the street crossing. This was especially so, if at the time of crossing I street there was also a train passing upon the Rio Grande track. Considering that the noise of the train passing upon the other track might serve to distract the attention of those passing at the street crossing, a peculiar vigilance was incumbent upon the defendant's employés. But although you should believe that the defendant's employés were negligent in the management of the engine, and that but for such negligence plaintiff's intestate would not have lost his life, yet if the deceased was guilty of any fault or negligence which contributed to
245 occasion his death, the plaintiff cannot recover. Plaintiff's intestate being upon the railroad crossing at I street, or attempting to cross the railroad, was bound to exercise all that degree of care and cir-

cumspection which a man of ordinary prudence and caution dwelling in the neighborhood would have exercised under the same circumstances; knowing all that Twombly knew in regard to the frequency or infrequency with which trains and engines were accustomed to pass there upon defendant's railway, and the probability or improbability that trains or engines might pass at that hour, and knowing also of the passing train upon the Rio Grande Railway. The fact that another train was passing upon the Rio Grande Railway added to the necessity of vigilance upon the part of Twombly, as well as upon the part of the company.

"If the plaintiff's intestate failed to exercise the measure of vigilance and care above set down as required of him, the plaintiff cannot recover. If you find, however, that the plaintiff's intestate was not
246 guilty of negligence contributing to his death, and resolve the other question in favor of the plaintiff, you will find the defendant guilty, and assess and report to the court the plaintiff's damages.

"As the plaintiff's actual damages you may allow her such a sum as in your judgment from the evidence before you would be a fair and reasonable compensation for the loss of the support and maintainance which the deceased, had he lived, would have provided for the plaintiff.

"And if you find from the evidence that deceased came to his death by reason of the gross neglect of defendant's employés, and without negligence on his part, you may allow exemplary damages by way of punishment for the defendant's wrong, proportioned to the circumstances of aggravation or mitigation appearing in the evidence.

"If the place of the accident was at the crossing of a public street, and if defendant's employés were passing the street crossing
247 without ringing the engine bell, or without keeping a lookout in the direction in which they were going, this was a gross negligence.

"If you should come to a verdict during the recess of the court, you may reduce it to writing in the following form, if for the plaintiff:

"LOUISA TWOMBLY, ADMINISTRATRIX,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.

"We find the said defendant guilty, and assess the plaintiff's damages in dollars.

"Or if you find for the defendant, then in the following form:

"LOUISA TWOMBLY, ADMINISTRATRIX,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY.

"We find the said defendant not guilty.

"After reducing it to writing let one of your number sign it as foreman, seal it up, and deliver it so sealed to the bailiff who has you in charge, and you may then separate, to meet the court on to-morrow morning at nine o'clock.

"During your separation you will not announce or make known
248 your verdict or your individual opinion, or the opinion of any one of you, to any person wheresoever, nor hold conversation with any person touching this cause."

3. The court erred in refusing to give the jury the following instructions, as asked by defendant, to wit:

"If the jury believe from the evidence that the accident complained of by the plaintiff herein was the result of the fault or negligence of George W. K. Twombly, the deceased, or the fault or negligence of both the defendant and the said deceased, without any intentional wrong on the part of the defendant, then the plaintiff cannot recover.

"If the jury believe from the evidence that the deceased, George W. K. Twombly, just before his death, stepped upon the track of the defendant, and failed to look up and down said track for approaching engines or trains, and thereby received the injury or injuries that resulted in his death, then the jury will find for the defendant."

249 4. The court erred in refusing the defendant's motion for a new trial for the reasons in said motion specified.

5. The court erred in giving judgment for the plaintiff.

And the said appellant prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of said judgment, etc.

ALFRED SAYRE,
CHAS. W. WRIGHT,
HUGH BUTLER,
Attorneys for Appellant.

(Endorsed:) G. D. No. 222. Term No. 92. The Kansas Pacific Railway Company, appellant, vs. Louisa Twombly, administratrix of the estate of George W. K. Twombly, deceased, appellee. Assignments of error. Filed February 15th, 1875. Jno. W. Webster, clerk. Sayre, Wright & Butler, attorneys for appellant.

250 And afterwards, on, to wit, the same 15th day of February, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a motion to strike out portions of the bill of exceptions in the transcript of record from the court below, in this cause, which said motion is in words and figures as follows, to wit:

In the supreme court of the Territory of Colorado, of the February term, A. D. 1875.

THE KANSAS PACIFIC RAILWAY COMPANY, appellant,
vs.
LOUISA K. TWOMBLY, APPELLEE.

Appeal from the district court of the first judicial district of said Territory within and for the county of Arapahoe.

And now comes the said appellee, by John Q. Charles and Alfred C. Phelps, her attorneys, and moves the court herein to strike from and out of the bill of exceptions contained in the record in this said cause, 1st, all of the testimony contained therein; 2nd, all the proceed-
251 ings had in said cause on the trial thereof in the said district court, at the April term thereof, A. D. 1874; 3d, all the instructions to the jury asked for by the defendant, said appellant, and refusal by the said court on or at the close of said trial; and, 4th, all the in-

structions given by the said court to the jury on or at the close of said trial, for the following reasons, to wit:

1st. Because no bill of exceptions as to said matters, nor any of them, was tendered at or during the term of said district court, at which said cause was tried, and said instructions so asked for by appellant were refused, and said instructions complained of given.

2nd. Because at the said last-mentioned term of said district court no leave of said court was asked for or obtained to tender or file a bill of exceptions to the matters and things aforesaid, or any of them, and no order of said court was made allowing the same to be done.

3d. Because said district court had no authority or power, at the subsequent term of said court to allow the said appellant to embody,
252 incorporate, embrace, or include the matters and things aforesaid, or any of them, in the said bill of exceptions herein.

4th. Because the only matter which could properly be included and incorporated in said bill of exceptions herein was the said appellant's written motion for a new trial of the said cause, together with a recital that the same had been denied and overruled.

5th. Because the judge of said district court had no lawful right or authority to sign and seal said bill of exception whilst the same contained said matters and things now asked to be stricken out as aforesaid or any of them.

CHARLES & PHELPS,
Attorneys for Appellee.

(Endorsed:) In the supreme court of Colorado Territory, of the February term, A. D. 1875. The Kansas Pacific Railway Company, appellant, vs. Louisa K. Twombly, adm'x, appellee. Mo. to strike out portion of bill of exceptions. Filed February 15th, 1875. Jno. W. Webster, clerk. Charles & Phelps, for appellee.

253 And afterwards on, to wit, the 25th day of February, A. D. 1875, the same being one of the regular juridical day of the February term, A. D. 1875, of the supreme court of the Territory of Colorado, the following among other proceedings were had and entered of record as follows, to wit:

THE KANSAS PACIFIC RAILWAY COMPANY, appellant, *vs.* LOUISA TWOMBLY, ADMINISTRATRIX OF THE estate of George W.K. Twombly, deceased, appellee. } 222, 9?.

Appeal from district court, Arapahoe County.

At this day comes the said appellant by Messrs. Sayre, Wright & Butler, its attorneys, and the said appellee by Messrs. Charles & Phelps, her attorneys also comes, and this cause coming on to be heard upon the motion of said appellee to strike from the record in this cause certain matters contained in the bill of exceptions reserved by the said appellant upon the trial of the issues joined herein in the said district court,
254 and the same having been argued by counsel and submitted to the consideration and judgment of the court, it is ordered by the court, that as to the evidence heard by the jury and the charge of the court given upon the trial of said issues in the said district court the said motion be denied, and that as to the instructions prayed by ap-

pellant and refused by the said district court the said motion be sustained.

And afterwards on, to wit, the 26th day of February, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado the bill of exceptions to the ruling of the court in the above entitled cause, which is in words and figures as follows, to wit:

In the supreme court of the Territory of Colorado, of the February term, A. D. 1875.

THE KANSAS PACIFIC RAILWAY COMPANY, appellant,
vs.
LOUISA K. TWOMBLY, appellee.

Appeal from the district court of Arapahoe County.

255 Be it remembered that at the said February term, A. D. 1875, of the supreme court of said Territory in the said cause came the said appellee on the 15th day of February, A. D. 1875, the same being one of the regular juridical days of said term of said court, and filed herein her motion to strike out of the record certain portions of the bill of exceptions contained therein, which motion is in the words and figures following, to wit:

In the supreme court of the Territory of Colorado, of the February term thereof, A. D. 1875.

THE KANSAS PACIFIC RAILWAY COMPANY, appellant,
vs.
LOUISA K. TWOMBLY, APPELLEE.

Appeal from the district court of the first judicial district of said Territory, within an' for the county of Arapahoe.

And now comes the said appellee by John Q. Charles and Alfred C. Phelps, her attorneys, and moves the court herein to strike from and out of the bill of exceptions contained in the record in this said cause, 1st, all the testimony contained therein; 2d, all of the proceedings
256 had in said cause on the trial thereof in the said district court at the April term, A. D. 1874; 3d, all the instructions to the jury asked for by the defendant, said appellant, and refused by the said court on or at the close of said trial; and 4th, all the instructions given by the said court to the jury on or at the close of said trial, for the following reasons, to wit:

1st. Because no bill of exceptions as to said matter nor any of them was tendered at or during the term of said district court at which said cause was tried, and said instructions so asked for by appellant were refused and said instructions complained of given.

2nd. Because at the said last mentioned term of said district court no leave of said court was asked for or obtained to tender or file a bill of exceptions to the matters and things aforesaid or any of them, and no order of said court was made allowing the same to be done.

3d. Because said district court had no power or authority at the subsequent term of said court to allow the said appellant to embody,
257 incorporate, embrace, or include the matters and things aforesaid, or any of them in the said bill of exceptions herein.

4th. Because the only matter which could properly be included and incorporated in said bill of exceptions herein was the said appellant's written motion for a new trial of the said cause together with a recital that the same had been denied and overruled.

5th. Because the judge of said district court had no lawful right or authority to sign and seal said bill of exceptions whilst the same contained said matters and things now asked to be stricken out as aforesaid or any of them.

CHARLES & PHELPS,
Attorneys for Appellee.

And afterwards at the said term of said supreme court and on the 25th day of February, A. D. 1875, the same being one of the regular juridical days of said term of said court, the said motion of the said appellee came on to be heard, and being then and there by the said court considered, so much of the motion of the said appellee as relates to the instructions asked for by the defendant, said appellant, and
258 refused by the said district court, etc., was by the said supreme court sustained and granted, and as to the residue and remainder of the said motion of the said appellee the same was denied and refused by the said supreme court to which portion of the said decision of the said supreme court in denying a part of the said motion of the said appellee as aforesaid, the said appellee at the time excepted, and inasmuch as the matters and things aforesaid do not appear of record, the said appellee presents this her bill of exceptions, and prays that the same may be signed and sealed and made part of the record of this said cause, which is accordingly done.

[SEAL.]
[SEAL.]
[SEAL.]

The exception above prayed was announced and reserved by the said appellee at the time of the ruling and opinion therein mentioned, and this bill of exceptions was tendered for signature on the 26th day of Feb'y, 1875, being one of the days of the term, but the judges of
259 the court declined to sign, seal, or allow the same bill of exceptions, for that, in the opinion of the judges, no exception lies in such case.

MOSES HALLETT, *C. J.*
E. T. WELLS, *A. J.*

(Endorsed:) 222. In the supreme court of Colorado Territory. The K. P. R. R. Co. vs. Louisa K. Twombly. Bill of ex. to the ruling of the court. Filed February 26, 1875. Jno. W. Webster, clerk.

And afterwards on, to wit, the 28th day of February, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado by the appellee her joinder in error in the above-entitled cause, which is in words and figures as follows, to wit:

Joinder in error.

In the supreme court of the Territory of Colorado, of the February term thereof, A. D. 1875.

THE KANSAS PACIFIC RAILWAY COMPANY, appellant,
vs.
LOUISA K. TWOMBLY, ADM., ETC., APPELLEE.

Appeal from the district court of Arapahoe County.

260 And the said Louisa K. Twombly, said appellee, by Charles & Phelps, her attorneys, comes and says that there is no error either in the record and proceedings aforesaid, or in giving judgment aforesaid in manner and form as above assigned, and therefore he prays that the said judgment may be affirmed and that his costs may be adjudged to him, etc.

By CHARLES & PHELPS,
Her Attorneys.

(Endorsed:) 222. In the supreme court of Colorado Territory, of the Feb'y term, A. D. 1875. The K. P. R. R. Co. vs. Twombly. Joinder in error. Filed February 28, 1875. Jno. W. Webster, clerk.

And afterwards on, to wit, the 15th day of March, A. D. 1875, the same being one of the regular juridical days of the February term, A. D. 1875, the following among other proceedings were had and entered of record in the above-entitled cause, as follows, to wit:

261 KANSAS PACIFIC RAILWAY COMPANY, appellant,
vs.
LOUISA K. TWOMBLY, ADMINISTRATRIX OF THE estate of George W. K. Twombly, appellee. } 222, 92.

Appeal from district court, Arapahoe County.

At this day comes the said appellant by Messrs. Sayre, Wright & Butler, its attorneys, and the said appellee by Messrs. Charles & Phelps, her attorneys, and this cause coming on to be heard upon motion of said appellee, it is ordered by the court that the said appellant file its written arguments in this cause by Monday, the twenty-second day of March, and that the said appellee file her arguments in answer thereto within five days next thereafter.

And afterwards on, to wit, the 13th day of March, A. D. 1876, the same being one of the regular juridical days of the February term, A. D. 1876, the following, among other proceedings, were had and entered of record in the above entitled cause as follows, to wit:

262 THE KANSAS PACIFIC RAILWAY COMPANY, appellant,
vs.
LOUISA K. TWOMBLY, ADMINISTRATRIX OF THE estate of George W. K. Twombly, deceased, appellee. } 222, 92.

Appeal from district court, Arapahoe County.

Now, on this day come the said parties by their respective counsel,

and, upon motion of said appellee, it is ordered by the court that said appellee have leave to file additional briefs herein until the twentieth instant.

And afterwards on, to wit, the 28th day of March, A. D. 1876, the same being one of the regular juridical days of the February term, A. D. 1876, the following among other proceedings were had and entered of record in the above entitled cause as follows, to wit:

263 THE KANSAS PACIFIC RAILWAY COMPANY, appellant,
vs.
LOUISA K. TWOMBLY, ADMINISTRATRIX OF THE estate of George W. K. Twombly, deceased, appellee. } 222, 92.

Appeal from district court, Arapahoe County.

Now, on this day comes the said appellant by Messrs. Sayre, Wright & Butler, its attorneys, and the said appellee by J. Q. Charles, esq., her attorney, also comes; and this cause comes on to be heard as well upon the transcript of judgment and other proceedings had in the said district court for the county of Arapahoe as also upon the matters herein assigned for error, and it appearing to the court that there is no error in the record and proceedings aforesaid, nor in giving judgment aforesaid, it is considered by the court that the judgment in form aforesaid given be in all things affirmed, and stand in full force and effect; that the opinion of the court filed herein be recorded, and that said
264 appellee do have and recover of and from said appellant her costs and charges in this behalf expended to be taxed, and that she have execution therefor.

And afterwards on, to wit, the 4th day of May, A. D. 1876, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a writ of error in the above-entitled cause, the original of which is hereunto attached, and is in words and figures as follows, to wit:

265 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, as the judges thereof, between the Kansas Pacific Railway Company, appellant, and Louisa Twombly, administratrix of the estate of George W. K. Twombly, deceased, a manifest error hath happened, to the great damage of the said the Kansas Pacific Railway Company, appellant as aforesaid, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and

there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] JNO. W. WEBSTER,
Clerk of the Supreme Court of the Territory of Colorado.

Allowed by—

ANDREW W. BRAZEE,
Associate Justice Sup. C't Col. Ter.

(Indorsed:) Kansas Pacific Railway Company, plaintiff in error, vs. Louisa Twombly, administratrix of the estate of George W. K. Twombly, deceased, defendant in error. Original writ of error. Filed May 4, 1876. Jno. W. Webster, clerk.

266 And afterwards on, to wit, the 4th day of May, A. D. 1876, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a supersedeas bond in the above entitled cause, which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, Joseph E. Bates and Robert R. McCormick, both of the city of Denver, in the county of Araphoe, and Territory of Colorado, are held and firmly bound unto Louisa Twombly, administratrix of the estate of George W. K. Twombly, deceased, in the full and just sum of seven thousand five hundred dollars, to be paid to the said Louisa Twombly, of the said city of Denver, her certain attorney, executors, administrators, or assigns, to which payment we bind ourselves, our heirs, executors, and administrators, jointly and severely by these presents.

Sealed with our seals and dated this fourth day of May, in the year of our Lord one thousand eight hundred and seventy-six.

267 Whereas lately, on the twenty-eighth day of March, A. D. 1876, at the February term, A. D. 1876, of the supreme court of the Territory of Colorado, in a suit lately depending in said court between the Kansas Pacific Railway Company, appellant, and Louisa Twombly, administratrix as aforesaid, appellee, a judgment was rendered against the said Kansas Pacific Railway Company, and in affirmance of the judgment, from which judgment an appeal had been taken to said supreme court of the Territory of Colorado, and the said Kansas Pacific Railway Company having obtained a writ of error pursuant to law and filed a copy thereof in the clerk's office of said court to reverse the judgment of the said supreme court of the Territory of Colorado in the aforesaid suit, and a citation directed to the said Louisa Twombly, administratrix as aforesaid, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington,

268 on the second Monday of October, A. D. 1876:

Now the condition of the above obligation is such that if the said Kansas Pacific Railway Company shall prosecute its said suit in error to effect, and answer all damages and costs if it shall fail to make

plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.]
ROBERT R. McCORMICK. [SEAL.]
JOSEPH E. BATES. [SEAL.]

Sealed and delivered in the presence of—
ALFRED SAYRE.

Approved by me May 4th, 1876.

ANDREW W. BRAZEE,
Associate Justice Sup. C't Col. Ter.

(Endorsed:) Kansas Pacific Railway Company, plaintiff in error, vs. Louisa Twombly, administratrix, defendant in error. Supersedeas bond. Filed May 4, 1876. Jno. W. Webster, clerk. Sayre, Wright & Butler, att'ys for pl'ff in error.

269 And afterwards on, to wit, the 4th day of May, A. D. 1876, there was filed in the office of the clerk of the supreme court of the Territory of Colorado an affidavit of the amount in controversy in the above-entitled cause, which said affidavit is in words and figures as follows, to wit:

In the Supreme Court of the United States, *ss:*

Error to supreme court of Colorado Territory.

KANSAS PACIFIC RAILROAD COMPANY, PLAINTIFF in error,
vs.
LOUISA TWOMBLY, ADMINISTRATRIX OF THE ESTATE of George W. K. Twombly, deceased.

Alfred Sayre, being duly sworn, deposes and says that he is the attorney of the above plaintiff in error: that the amount in controversy in the above entitled suit is a judgment rendered against the said
270 plaintiff in error for the sum of five thousand dollars damages, and costs.

ALFRED SAYRE.

Subscribed and sworn to before me this 4th day of May, A. D. 1876.
SEAL SUPREME COURT COLORADO TERRITORY. JNO. W. WEBSTER,
Clerk Supreme Court Colorado Territory.

(Endorsed:) Kansas Pacific Railway Co., pl'ff in error, vs. Louisa Twombly, adm'x, &c., d'f't in error. Affidavit of amount in controversy. Filed May 4th, 1876. Jno. W. Webster, clerk.

And afterwards on, to wit, the 5th day of May, A. D. 1876, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a citation in the above entitled cause, the original of which, with the endorsement thereon, is hereunto attached, and is in words and figures as follows, to wit:

271 The United States of America to Louisa Twombly, administratrix of the estate of George W. K. Twombly, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the Territory of Colorado, wherein the Kansas Pacific Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why a judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Andrew W. Brazee, associate justice of the supreme court of Colorado Territory, this eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-five.

ANDREW W. BRAZEE,
Associate Justice Sup. C't Col. Ter.

272 On this fifth day of May, in the year of our Lord one thousand eight hundred and seventy-six, personally appeared Arthur A. Fletcher, before me, the subscriber, Jno. W. Webster, clerk of the supreme court of the Territory of Colorado, and makes oath that he delivered a true copy of the within citation to John Q. Charles, one of the attorneys of record for Louisa Twombly now and at the time of the rendition of the judgment, to reverse which the within-named plaintiff has sued out a writ of error from the Supreme Court of the United States.

ARTHUR A. FLETCHER.

Sworn to and subscribed, the 5th day of May, A. D. 1876, before me.

[SEAL] JNO. W. WEBSTER,
Clerk Supreme Court Colorado Territory.

(Indorsed:) The Kansas Pacific Railway Company, plaintiff in error, vs. Louisa Twombly, administratrix of the estate of George W. K. Twombly, deceased, defendant in error. Original citation. Filed May 5, 1876. Jno. W. Webster, clerk.

273 And heretofore on, to wit, the 25th day of February, A. D. 1875, the same being one of the regular juridical days of the February term, A. D. 1875, of the supreme court of the Territory of Colorado, there was filed in the office of the clerk of said court the opinion of the judges of said court made in said cause upon a motion to strike out parts of the bill of exceptions a copy of which is hereto annexed, in accordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

Motion to strike out parts of the bill of exceptions.

KANSAS PACIFIC RAILWAY COMPANY,
vs.
TWOMBLY, ADM'X.

WELLS, J.:

Convenience often requires that the consideration of a motion for new trial should be deferred from the term at which the trial occurs
274 to a succeeding term. The usage of our courts sanction such continuance, and this usage is not without the support of authority. Riddlesberger vs. McDaniel (38 Mo., 140); Laird vs. Ashley (1 Clark Ia., 571); Walker vs. Hale (16 Ala., 27).

The power to grant or deny such motion at a succeeding term, even before a different judge than the one who presided at the trial has been

recognized. Ott vs. McHenry (2 W. Va., 77); United States vs. Harding (1 Wallace jr., 127). By what means in the case last suggested the occurrances of the trial shall be presented upon the determination of the motion is not material to the present inquiry.

When the motion comes on at a subsequent term before the judge who presided upon the trial, the same consideration must, it would seem, control as if the determination were had at the time of the trial.

If a bill of exceptions shall have been settled embodying the evidence, reference may of course be had to this. In the absence of such
275 bill of exceptions it would seem to be proper to refer to the judg's notes of the trial, or to those of counsel, or the judge may refer to his own recollection merely.

In many cases the issue is altogether one of fact, no question of law being controverted, and no exception reserved either to the admission or exclusion of testimony, or to any point of the charge. In such case manifestly no bill of exceptions whatever can be settled or allowed in advance of the determination of the motion for a new trial. If, out of abundant caution and diligence, one is prepared it is still not a bill of exceptions, nor is in any way effectual to authenticate the evidence. In such case the law affords no memorial by which the court may inform itself of what evidence was heard by the jury. Unless, therefore, the judge may refer to his notes, or to his memory of the evidence, as confessedly he may do at the trial term, there is nothing by which he may advise himself as to whether the verdict ought or ought not to stand.

The result is that the motion must, at every term subsequent to
276 that of the trial, be overruled, as of course; in other words, that it shall not then be considered, which is to deny the power to continue such motions; and this, as before seen, is opposed to authority.

Conceeding, then, that the motion for a new trial may be continued and determined at a time succeeding that at which the trial occurred, and that at such subsequent term the judge presiding may determine what the evidence given to the jury was, by such sources of information as above suggested, it follows that, if an exception be reserved to the denial of the motion, the party excepting must be at liberty to insert in his bill of exceptions not only the motion, but the testimony heard by the jury. For the statute which gives the right of exception must be held to apply indiscriminately, whether the motion be denied at the term of the trial or subsequently, and this manifestly implies that the party aggrieved shall be at liberty to bring the whole matter before the court as fully as it was presented to the mind of the judge presiding
277 below; otherwise the right to except, given in the statute, is without value and the statute itself nugatory.

All the evidence heard at the trial may therefore properly be embodied in the bill of the exception reserved to the overruling of the motion for a new trial, and so, as it would seem, may the instruction given the jury; at least in many cases, for when, as in the present action, the pleadings on the part of the defendant consist of a general denial of what is alleged by the plaintiff, reference to the charge of the court is often necessary to determine what precise issue was submitted to the jury. (Steph. Pl., App. I (n), 15.)

The motion to strike out of the bill of exceptions the evidence and the instructions given will therefore be denied.

So much of the motion as goes to the instructions prayed by the appellant and refused by the court below depends upon different considerations.

It is every day practice to assign as ground of a motion for new
278 trial errors alleged to have intervened in the admission and exclusion for testimony, the charge to the jury and like matters. Due regard to the rights of litigants requires that suggestions of this character should be entertained upon the determination of the motion rather than that the error being passed by the party aggrieved should be put to his appeal, or other process of review.

It has sometimes, indeed, been deemed requisite that, to give advantage of such errors in the court of final resort, a motion for new trial should be interposed, assigning for cause the error complained of. Tolland vs. Willington (26 Mo., 58); Hœrsh vs. The Bank (10 Mo., 516).

These cases seem to proceed upon the idea that opportunity ought to be afforded to the court in which the trial occurs to correct its own errors, and failing to present such opportunity, the party complaining ought not to be heard. It is conceived that a different rule prevails with us. At the common law no method was provided by which
279 the opinion of the court expressed upon questions of law during the trial could be brought in view upon writ of error, or other subsequent occasion.

The statute of 13 Edward I, Chap. 13, allowed the bill of exceptions for the purpose. This enactment adopted with us by the act of October 11, 1861 (R. S., ch. XVI), gave the means of preserving a memorial of the errors committed upon the trial and bringing them to the view of this court.

But even after this statute it could not be assigned for error that the verdict was contrary to evidence. If the jury found upon insufficient evidence, and judgment was given thereon, no means were afforded by which relief could be obtained, and so is the law at this day in the courts of the United States.

The statute allowing an exception to the overruling of motions for new trial was, it is conceived, intended to meet this defect, and not to give an additional means of relief for errors intervening in the course of the trial and for which a sufficient remedy was before
280 provided. Hill vs. Ward, (2 Gilen, 293); Sullivan vs. Dollins, (13 Ill., 88); Howe vs. Sims, (16 Mo., 431); Dozier vs. Jerman, (30 Mo., 220); Devlin vs. Clark, (31 Mo., 22).

Therefore, to entitle the defeated party to a review in this court of errors committed upon the trial, an exception must be reserved at the time and brought into the record by bill of exceptions, settled and sealed, either at the time of the trial or afterwards, and within a day allowed for that purpose under the statute. (R. S., ch. LXX, sec. 21.) And while the court below may in its discretion award a new trial for errors to which no exception was taken or preserved, yet if it refuse so to do an exception to the denial of the motion will not suffice to present the matter for review in this court. Farrar vs. Fuller, (8 Clark, Ia., 348).

So far as the revisory power of this court is concerned, the only question presented to the court below upon the motion for new trial was the sufficiency of the evidence to maintain the verdict. While that
281 court might in its discretion have gone beyond this it was not required to do so; nor are we permitted to entertain any other question.

Now, upon this question the instructions which were prayed by the appellant and refused by the district court, in no manner came into

view on the hearing of the motion for new trial, and are not to be considered here.

As to these, therefore, the motion will be sustained.

It was suggested upon the argument of this motion that certain exceptions to the admission and exclusion of evidence were set forth in this bill of exceptions. If the bill does contain such exceptions they are improperly there, and might be made the subject of further motion. Inasmuch, however, as counsel for the appellant has denied the existence of such exceptions, and distinctly disclaimed all reliance thereon, it may be proper to say, in order to avoid further delay, that all such exceptions, if any, will be disregarded.

282 (Endorsed:) 222. K. P. Railway Company vs Twombly, adm'x. Opinion. Recorded. Filed February 25, 1875. Jno. W. Webster, clerk.

And also on, to wit, the 28th day of March, A. D. 1876, the same being one of the regular juridical days of the February term, A. D. 1876, of the supreme court of the Territory of Colorado, there was filed in the office of the clerk of said court the opinion of the court in said cause, a copy of which is hereunto annexed, in accordance with rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

In the supreme court, Feb'y term, 1876.

KANSAS PACIFIC RAILWAY CO.
vs.
LOUISA TWOMBLY, ADMINISTRATRIX.

Appeal from district court Arapahoe County.

283 HALLETT, C. J.:

At the last term we examined the bill of exceptions in the record, and the time and manner in which it was perfected, and arrived at the conclusion that the several rulings of the court in admitting and rejecting testimony at the trial, and in directions to the jury, were not properly preserved, and that the only matter presented for review in this court is the ruling upon the motion for new trial. (2 Colorado, 559.)

According to that decision and an earlier case, (2 Colorado, 169,) the only question for present consideration is the finding of the jury, which we cannot disturb unless it appears to be clearly against evidence or without support. This view is not controverted, but it is said that the evidence discloses a want of due care on the part of appellees' intestate at the time of the alleged injury which contributed to the result. This, if true, will defeat the action, for it is considered that in a place of danger such as a railroad track on which cars frequently pass, every one is

284 bound to be vigilant in his own protection according to the common experience of men of ordinary prudence under like circumstances. But it does not rest with the plaintiff to prove that deceased used such care and caution, although it is enough that the absence of it appears in his evidence. Railroad Co. vs. Gladmon, (15 Wal., 401.) Upon facts admitted or clearly proved the inference of negligence in the party injured is often so strong that the law will not admit the plaintiff's right of action, but in other cases it is said to be a question for the jury. Railroad Co. vs. Stout, (17 Wal., 657). It is often difficult to trace the line between these classes of cases, but it here appears to be quite distinct. The situation of deceased at the time of the accident was peculiar, and it is not at all certain that a prudent man under like circum-

stances would have behaved differently. Two railroad tracks were laid in a public street of the city of Denver, one of which was used
285 by the Denver and Rio Grande Co., and the other by appellant. The general course of this street is said to be north and south, and it is intersected at regular intervals by other streets crossing at right angles, all of which were used by the public. On one of these cross streets deceased came from the west first to the track of appellant, which was upon that side, and then to the track of the Rio Grande Co., on which a train was approaching from the north, at a speed of 5 or 6 miles an hour. On this latter track, and directly in front of the approaching train, deceased met one Truax, who put his hand on deceased' shoulder and pressed him back to appellant's track as if to speak to him. At the time he so met deceased, Truax was coming from the east in a rapid
286 walk or run, and the Rio Grande train was so near the place of meeting that there was no time for words, and to use his own phrase Truax carried deceased back, in order that he might speak with him. In this it is supposed that deceased exhibited a want of care, for it is said that having passed appellant's track in safety he should not have returned to it, and perhaps this is so, but we must remember that all men do not decide wisely in sudden emergencies of danger.

We are not very well informed as to Truax's manner in approaching deceased, except that it was hurried, and therefore we cannot say what the latter might have inferred from his conduct. Possibly Truax' appearance and bearing was such as to indicate that new dangers lay in the pathway of deceased, and certainly his conduct indicated that he had a matter of importance to impart. To hold as a matter of law that a correct decision must be made upon the instant under the circumstances is
287 too large a demand upon human infirmity. Nor can it be said with certainty that at the point of turning back deceased had notice of the danger which awaited him on appellant's track. He had just crossed that track safely, and if in doing so he looked for a reasonable distance in each direction along the track, it does not appear that appellant's locomotive was then within such distance. If upon coming to a railroad track in a city a footman is bound to look for cars in both directions (a point upon which we express no opinion), it is plain that he is not in all cases required to look as far as the track may be seen. In cities and towns railroad trains are usually moved slowly, and there is not the same reason for looking for a great distance along the track that obtains in the country where trains are driven at high speed. This may not be true everywhere in Eastern States where express trains are often taken through considerable towns and villages at high
288 speed, but it is generally true with us, and the evidence warrants the belief that the roads in question were so used.

If then, upon first coming to appellant's track as a footman, deceased looked in each direction for a reasonable distance, as it is said he was bound to do, it does not appear that the locomotive was then within such distance, and therefore it cannot be said that he was advised of danger from that locomotive. Nor, if he saw the locomotive with the tender in advance at a distance of several hundred feet, can it be said with certainty that he knew that it was approaching him. In a front view with piston and driving wheels in motion the approach of an engine is much more easily detected than when it is backed up and the tender only on the low wheels is in the line of vision. Upon this we can conclude that turning back from the Rio Grande track was not an act of negligence which the law will recognize as such, but that

matter was for the consideration of the jury to whom it was properly referred, and we will now advert to what occured afterwards.

289 The carelessness imputed to deceased at this point is in not looking for the approaching locomotive, for it is probable that he could not hear it on account of the noise made by the Rio Grande train. If, as claimed by counsel, he remained on the track for a considerable time without looking, there would be some ground for the charge, but the jury may have reached another conclusion on the evidence. The only witness to that interview was Truax, and although he stated that he and deceased stopped on the track, at another time he says he "almost kept right along." But few words were exchanged, and Truax ran away without seeing or hearing the approaching locomotive, and had gone but 20 feet when the accident occurred. Upon this the jury may have believed that deceased paused but a few seconds, and as to that, it stands in the same catagory with the other circumstances of this affair. We think, therefore, that as a matter of law it cannot be said that the negligence of deceased directly contributed to his death,

290 and whether this was true as matter of fact was for the consideration of the jury. To them it was properly referred, and by them it has been determined in conformity with established principles of law. Those principles are recognized in the following cases, with which, as we have learned from the argument, counsel are entirely familiar. Railway Co. vs. Whitland, adm'x, (13 Wal., 270, S. C., 2 Bissell, 282), Wheelock vs. Boston & Albany Railroad Co. (105 Mass., 203,) Marietta and Cincinnati Railroad Co. vs. Picksley (24 Ohio St., 65.)

No point is made as to the negligence of appellant's servants, which appears to have been pretty clearly made out, and therefore we do not discuss it. As to the suggestion that the injury was inflicted by the Rio Grande train, it is not supported by the evidence, and the jury have found otherwise.

Upon the whole case, we see no reason to disturb the verdict, and the judgment will be affirmed with costs.

291 (Endorsed) 222. Kansas Pacific Railway Company vs. Louisa Twombly, administratrix. Opinion. Recorded. Filed March 28, 1876. Jno. W. Webster, clerk.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

I, John W. Webster, clerk of the supreme court of the Territory of Colorado, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinions filed in the cause herein mentioned as the same now appear remaining in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of Colorado at Denver this 13th day of June, A. D. 1876.

[SEAL.] JNO. W. WEBSTER,
Clerk Supreme Court C. T.

Clerk's fees for transcript: 539 folios, @ 20, $107.80; certif. & seal 1.00—$108.80.

292 Received payment of Alfred Sayre, esq., att'y for pl'ff in error.
JNO. W. WEBSTER,
Clerk Supreme Court.

(Indorsement on cover:) No. 282. The Kansas Pacific Railway Company, plaintiff in error, vs. Louisa Towmbly, adm'x of George W. K. Twombly, dec'd. Colorado Terr'y sup. court. Filed 20th October, 1876.

O

In the Supreme Court of the United States.

THE KANSAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

LOUISA K. TWOMBLY, Administratrix of GEO. W. K. TWOMBLY, Deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This action was brought by plaintiff as administratrix of George W. K. Twombly, to recover damages, because of his death, alleged to have been occasioned by the negligence of the railroad company. The action is founded upon the statute of the late Territory of Colorado, being an act entitled "An Act concerning Damages." The entire act is as follows:

"Section 1. When the death of any person is caused by the wrongful act, misconduct, negligence, or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he or she lived, against the latter for the same act, misconduct, negligence, or omission. *Provided*, The action shall be commenced within two years from the date of the death of the injured person; that the damages shall inure to the exclusive benefit, first, of the husband or wife, if living, and if there be no husband or wife, to the child or children of the deceased; secondly, if there is neither a husband, wife, child, or children living, then to the father and mother, or to the surviving parent, if any." Approved February 8th, 1872.

This act was repealed March 7th, 1877. *General Laws of Colorado, p. 343.*

"Chapter XXV. Damages.

"An Act concerning damages, and to repeal an Act entitled 'An Act concerning damages,' approved February 8th, 1872.'

"Sec. 5. The act 'concerning damages,' passed by the council and house of representatives of the territory of Colorado, and approved February 8, 1872, is hereby repealed."

This suit was commenced on the 30th of August, 1873. (*Record, p. 1*). The declaration (*page 3*) alleges that the railroad company, on the 1st of July, 1872, was operating its railroad in the city of Denver, along Wyncoop street toward I street, and that Twombly, since deceased, was passing on foot along and upon the said I street, and over and across the said railroad. That the defendant, by its servants, drove its locomotive engine carelessly and improperly, with great force and violence upon said Twombly, and then and there killed him. The declaration also avers that the plaintiff is his widow and administratrix. She demanded judgment for one hundred thousand dollars.

The defendants appeared (*Record, page 5*), and plead the general issue. Upon that issue a trial was had by jury, which resulted in a verdict for plaintiff for five thousand ($5,000) dollars. (*Record, p. 6.*) Upon the coming in of the verdict, a motion was made to set aside the verdict and grant a new trial, and reasons filed therefor, among them: (*Record, p. 87.*)

"6. The Court erred in refusing to give to the jury each and every instruction asked by the defendant, *and also in giving each and every of the instructions not asked by the defendant but given to the jury.*"

The instructions complained of when given were objected to. (*Record, p. 86.*)

Judgment was entered upon the verdict (*Record, p. 6*), and an appeal prayed to the Supreme Court (*page 7*). The appeal was perfected, and upon bill of exceptions the cause was brought to trial in the Supreme Court on the 28th of March, 1876, and there the judgment was affirmed. (*Record, p. 22.*)

The following facts are to be noted:

1. That the cause came on for trial at the April term of the District Court (*Record, p. 6*), and the verdict was rendered at that term.

2. Upon the rendition of the verdict, a motion for a new trial was made and reasons filed therefor. (*Record, p. 86-7.*)

3. No other or further proceedings were had in the cause at that April term.

4. At the next September term, October 26 (*Record, p. 6*), the motion for a new trial came on to be heard, and was heard and overruled, and thirty days given to tender bill of exceptions. Afterwards, on the 17th of November, time was given the defendaut to tender "its bill of the exceptions reserved by it upon the trial of the issues herein joined, which when allowed and sealed by the said Judge, shall be filed herein as of the 23d day of October ultimo." This order was made in open court, without objection; the parties appearing by their attorneys. (*Record, p. 7.*)

5. Bill of exceptions signed as of October 23, 1874. (*Record, p. 7.*) Endorsement of Judge thereon, "Bill of ex. tendered to me this Nov. 20, 1874."

The bill of exceptions being filed; the railroad company filed its assignment of errors in the Supreme Court, to which the cause had been removed by appeal. (*Record, pp. 88 to 91.*) On the same day, the appellee moved to strike out of the bill of exceptions all the tes-

timony contained therein, all the proceedings had in the cause at the April term of the District Court, all the instructions asked by the appellant and refused, and all the instructions given by the Court. (*Record, p. 91.*) Upon the hearing of this motion (*Record, p. 92*), it was ordered that as to the evidence heard by the jury, and the charge of the Court given upon the trial of said issues, the said motion be denied, and that as to the instructions prayed by appellant and refused, the motion be sustained. To this decision of the Supreme Court a bill of exceptions was tendered (*Record, p. 93-4*), but the Judges declined to sign, seal, or allow the same, "for that, in the opinion of the Judges, no exception lies in such case." The opinion of the Supreme Court on this motion is set out in the Record, pp. 99 to 102 inclusive.

Among the assignments of error in the Supreme Court of Colorado (*page 90*), is set out the following portion of the charge of the Judge to the jury, to the giving of which the appellant at the time objected, and averred that the Court erred in giving the same to the jury:

"If the plaintiff's intestate failed to exercise the measure of vigilance and care above set down as required of him, the plaintiff cannot recover. If you find, however, that the plaintiff's intestate was not guilty of negligence contributing to his death, and resolve the other question in favor of the plaintiff, you will find the defendant guilty, and assess and report to the Court the plaintiff's damages.

"As to the plaintiff's actual damages, you may allow her such a sum as in your judgment, from the evidence before you, would be a fair and reasonable compensation for the loss of the support and maintenance which the deceased, had he lived, would have provided for the plaintiff.

"And if you find from the evidence that deceased came to his death by reason of the gross neglect of de-

fendant's employees, and without negligence on his part, you may allow exemplary damages, by way of punishment for the defendant's wrong, proportioned to the circumstances of aggravation or mitigation appearing in the evidence.

"If the place of the accident was at the crossing of a public street, and if the defendant's employees were passing the street crossing without keeping a lookout in the direction in which they were going, this was a gross negligence."

The instructions of the Court are set out at length in the record (*pp. 83 to 86*). By a law of Colorado of January 22, 1872 (*Session law*, 1872, *p. 99*), it is provided:

"Section 1. In the trial of all cases in any court of law in this Territory, when the evidence is concluded and before the case is argued or submitted to a jury, either party may move the Court to give instructions on any point of law arising in the cause, *which shall be in writing*, and shall be given or refused, *and the Court may of its own motion give like instructions.*"

The instructions of the Court were, therefore, in writing. The instructions are clear and perspicuous. Every paragraph of them well considered, and the objection to them was to each and all of them, and was sufficient and according to the practice of the Court. And so the motion for the new trial alleged that the Court erred in giving each and all of them.

Whether these instructions were correct or not, upon the evidence, is the question to be decided, and the errors committed by the Court and not assigned are based upon these instructions:

1. The said District Court erred in giving the following instruction to the jury:

"If you resolve these questions, however, in favor of the plaintiff (viz: That the deceased came to his death by the negligent act of the defendant), then the next question is, as to whether the deceased was guilty of any negligence which contributed to occasion his death, and upon this the burden of proof is upon the defendant, so that if there is a conflict in the testimony as to

any fact bearing upon this question and the testimony which tends to show such fact, seems to you no more convincing, and no more worthy of credit and belief than the testimony which tends to the opposite conclusion, you should resolve this doubt in favor of the plaintiff." (*Record, p. 89.*)

2. The said District Court erred in giving the following in charge to the jury, declaring it to be law of the land:

"It was the duty of the defendant's employees, in charge of the engine, to cause the bell thereof to be rung while crossing a street, and for a length of time before reaching the crossing, sufficient to give warning to all persons who might be crossing upon that street. (*Record, p. 89.*)

3. The said District Court also erred in giving the following:

"And if you find from the evidence that deceased came to his death by reason of the gross neglect of defendant's employees, and without negligence on his part, you may allow exemplary damages, by way of punishment for the defendant's wrong, proportioned to the circumstances of aggravation or mitigation appearing in the evidence.

"If the place of the accident was at the crossing of a public street, and if defendant's employees were passing the crossing without ringing the engine bell, or without keeping a lookout in the direction in which they were going, this was a gross negligence." (*Record, p. 90.*)

The Supreme Court of Colorado erred in not reversing the judgment of the said District Court, upon the foregoing and other errors assigned in that court.

Said Supreme Court also erred in affirming the judgment of said District Court.

It is not probable that the Supreme Court would have affirmed the judgment, but for the oversight and mistake of the Supreme Court in supposing that the directions to the jury were not properly preserved in the bill of exceptions. The fact was directly the contrary. (See the last paragraph but one on page 100 of the record.) The instructions were preserved in the record, and the Judges refused to sign a bill of exceptions to their decision, preserving such record. (*Record, p. 94.*) And yet the Supreme Court in the first paragraph of its decision (*page 102*), announces that the decision was the other way. This was a mistake.

To a correct understanding of the applicability of the instruction here first objected to, and error assigned for giving it, attention is called to the testimony of Truax, commencing on page 25 of the record. He is the only witness who testified of the way and manner of the deceased being upon the railroad crossing. He met deceased at the crossing of I street, upon the narrow guage track, and stopped to talk with him. As the narrow guage train was likely to pass, he put his hand upon deceased's shoulder, and caused him to move on to the Kansas Pacific wide guage track, and there engaged in conversation with him about the loan of a plow. The conversation lasted some time. The witness says: "I don't think I detained him — less than a minute probably." He said, "I started, passed along, passed twenty feet, heard an outcry, looked around, saw the other engine had passed along and killed him."

This testimony of Truax is the only evidence in the cause showing or tending to show the conduct of the deceased, either as to diligence or negligence, upon the occasion of his death. Truax was plaintiff's witness. He walked twenty feet, six or seven steps, from where

he left the deceased in the broad guage track. The deceased remained during all that time, and was killed. Now as there was no dispute about the facts, unless it was true that deceased had passed off the track, and was thrown back upon it by the narrow guage train, in which event the plaintiff in error it is conceded is not liable, it was a question of law, and not of fact, whether the deceased by remaining upon the track during the time it would have taken him to walk twenty steps away, as did Truax, was negligent or not.

Negligence is not to be imputed to one who crosses a railroad track at a highway crossing, but it is negligence to stop and loiter upon the track.

Brooks v. *R. R. Co., 25 Barbour, 600.*

Baxter v. *R. R. Co., 41 N. Y., 502.*

Butterfield v. *R. R. Co.. 10 Allen, 532.*

It was negligence in deceased and Truax to stop upon the track and hold a conversation there. They did so at their peril. It was negligence for the deceased to remain upon the track for any time *a fortiori* while he could with diligence have been twenty steps away. And so the instruction that the burthen of proving the negligence of deceased, was misleading, and caused the jury to suppose that the defendant must offer affirmative proof upon the question of the deceased's negligence. The instruction should have been: that if the deceased, in passing across the tracks upon the highway, stopped to converse with another, or remained upon the track, when he might with ordinary diligence have been twenty feet away, in consequence whereof he was killed, he was, by the law, negligent.

23 Conn., 339.
12 Pick., 177.
2 Kernan, 236.

Second Assignment of Error.

As to this assignment of error, the instruction of the Court was unqualifiedly wrong. The instruction is, that by the law, it was the duty of the defendant's employees in charge of the engine, to cause the bell to be rung while crossing I street, &c. There was no statute in Colorado, as in many other States, requiring the ringing of the bell upon the engine, at a street crossing, and without a statute there is no law upon the subject.

THIRD ASSIGNMENT OF ERROR.

The error of the Court in giving the instructions under this assignment complained of, was palpable. The action is based upon a statute which only authorizes the recovery of damages for the injury sustained by the party in whose behalf the action is given. And the rule is that the damages are not to be exemplary; nothing to be allowed on account of the physical or mental sufferings of the deceased, or for the sorrow, suffering, or grief, of the surviving relatives.

Sedgwick on Measure of Damages, 468.

In Barron's case, *5 Wallace, 93*, the Court instructed the jury that no damages shall be given by way of punishment. The statutes of Iowa and California allow exemplary damages, so the courts of these States hold. In most of the States the damages are limited, but the statutes are substantially like the British statute, and the rule is, with bare exceptions, that the damages to be assessed are actual and pecuniary, and not exemplary. *Sec. 636, Field on the Law of Damages, and cases cited.* Damages united to pecuniary compensation. *State* v. *Kuntz*, *Ohio St.*

This case was not submitted to the jury upon any such theory. They were left to assess damages other than pecuniary, and upon an absolutely false basis. They were instructed that other than pecuniary damages might be recovered for gross negligence, and they were erroneously instructed that failure to ring the bell, was gross negligence. It is hard to conceive that greater error could have been committed.

Fourth Assignment of Error.

This assignment of error is formal, intended only to complete the pleading in the record, if it be necessary to assign error upon the decision of the Supreme Court.

Fifth Assignment of Error.

The repeal of the statute under which this action was brought, pending the prosecution, abates the suit.

McCardle's case, 7 Wallace, 506.

Notwithstanding the Supreme Court of Colorado has recently decided that the eleventh section of the second article of the constitution of the State forbids the repeal of the law upon which the action is founded, yet it is believed such decision is erroneous and cannot be maintained. The section reads:

"Sec. 11. That no ex post facto law, nor law impairing the obligation of contracts or retrospective in its operation, or making any irrevocable grant of special privileges, franchises, or immunities shall be passed by the General Assembly." (*General Laws of Colorado*, 1877, *page 30.*)

The decision of the Supreme Court is that the repealing act was a retrospective law.

That Court did not take into consideration section one of the schedule of the constitution. That section reads:

"Section 1. That all laws in force at the adoption of this constitution shall, so far as not inconsistent therewith, remain of the same force as if this constitution had not been adopted, until they expire of their own limitation, or are altered or repealed by the General Assembly; and all rights, actions, prosecutions, claims and contracts of the Territory of Colorado, counties, individuals, or bodies' corporate (not inconsistent therewith), shall continue as if the form of government had not been changed and this constitution adopted." (*General Laws of Colorado*, 1877, *page 75.*)

The sections of the constitution quoted show quite clearly that it was not the intention of its framers to limit the powers of the Legislature to repeal statutes, and when repealed to terminate actions and all rights based upon them. This action is not based upon contract, nor is it given by the common law. It is an action in the nature of a penalty and may be taken away at any time while the cause remains in court and subject to its decision.

But we are not left to support this objection by placing the sections of the constitution above quoted in juxta position. The act repealing the law upon which this action is based is not a retrospective law.

J. P. Usher

Attorney for Plaintiffs in

IN THE

United States Supreme Court

THE KANSAS PACIFIC RAILWAY CO. *vs.* TWOMBLY. } *No. 62.*

POINTS AND AUTHORITIES UPON ASSIGNMENTS OF ERROR IN THIS CAUSE.

Upon second assignment—

Failure to ring bell or blow whistle at crossing, not negligence. G. and C. U. R. R. Co. vs. Dill, 22 Ills., 274. Artz case, 34 Iowa, 153. Spencer's case, 29 Iowa, 55. Hunter's case, 33 Ind., 335. See Terhune's case, 50 Ills., 151. 104 Mass., 137.

These cases hold that there is no rule of law unless declared by statute, requiring signals to be given on approaching a highway crossing.

Fifth assignment of errors;—

The suit abates by a repeal of the statutes. Butler vs. Palmer, 1 Hill, 324. This principle of law is too familiar to require support by authorities. The repealing Act is not a retrospective law. The Act repealed, imposed a penalty and conferred jurisdiction. That it was a penal act, see Richardson's case, 98 Mass., 91. Hoar, J. "How can that be regarded as anything else than a statute penalty which the personal representative is to recover by an action."

A right to recover a sum as a penalty, may be taken away any time before judgment. Bank vs. Freeze, 6 Shepley, 109. Confiscation cases, 7 Wall., 454. U. S. vs. Tymen,

11 Wall., 88. But where the right of action springs from contract or from the principles of common law, it is not competent for the legislature to take it away.

The repeal of a statute is not within the definition of a retrospective law. Jurists and law commentators, who comprehend what they say, do never confound acts of the legislature which repeal statutes conferring jurisdiction or inflicting penalties with retrospective laws. It is a misuse of words to call such repealing statute a retrospective law. They are never so classified by law commentators.

Retrospective laws, within the meaning of jurists, are such laws as reach back to and give some different legal effect to some previous transaction to that which it had under the law when it took place. Cooley on Constitutional Limitations, 370.

Obnoxious legislation of this character has always been held to apply only to actions founded upon vested rights springing from contract or from the common law. If decisions have been made holding the contrary to this fundamental rule, they are not law.

This court has never intrenched upon the salutary rule above stated, and the supreme court of Colorado were not within the domain of the decisions of this court growing out of comity, giving to state courts the right to construe the statutes and constitution of their states; when it undertook decide that the repeal of the statute conferring jurisdiction and right of action was a retrospective law. It is the province of this court to decide what laws are retrospective, and in deciding that question the construction of State Statutes and constitutions are not involved.

It is not within the province of any state court to make a decision binding on this court, that a law is retrospective.

The question does not depend upon the arbitrary construction of language.

J. P. USHER,
for Plaintiff in Error.

Argument of Counsel for Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

THE KANSAS PACIFIC RAILWAY COMPANY, *Plaintiff in Error.*

vs.

LOUISA TWOMBLY, ADMINISTRATRIX, ETC., *Defendant in Error.*

Error to the Supreme Court of the Territory of Colorado.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1879.

THE KANSAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error.
vs.
LOUISA TWOMBLY, ADMINISTRATRIX, ETC.,
Defendant in Error.

Error to the Supreme Court of the Territory of Colorado.

ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

This suit was instituted by the defendant in error, against the plaintiff in error, in the district court of Arapahoe county, Colorado Territory, for the negligent killing of her husband, George W. K. Twombly. The action is based upon an act of the legislature of said territory, "Concerning Damages," approved February 8th, 1872. (See Session Laws of Colorado, of 1872, pages 117, 118.)

The cause was tried before a jury on the issue of not guilty, at the April term of said court, A. D. 1874, resulting in a verdict for the plaintiff of $5,000. (See printed record, pages 5 and 6.)

At the same term of the court the plaintiff in error interposed a motion for a new trial, which was not disposed of until the next September term of court, when the motion was overruled. Judgment rendered for the plaintiff on the verdict for the sum of $5,000 and costs of suit. An appeal was prayed to the Supreme Court of the Territory, and time given the defendant, until the 30th of November, 1874, to tender to the judge of said court a bill of exceptions upon a motion for a new trial. (See printed record, pages 6, 7, 86 and 87).

On the 20th of November, 1874, the bill of exceptions contained in the records was tendered to the judge, signed and sealed by him and filed in the cause on January 22nd, 1875. (See printed record, page 87.) The cause was heard in the Supreme Court of the territory, and the judgment affirmed, whereupon the cause was removed to this court by writ of error.

The bill of exceptions filed in the cause purports to set forth the proceedings of the court on the trial of the cause, all of which occurred at a previous term of court from that in which the bill of exceptions was signed and sealed by the judge. To this, objection was made, and a motion was filed in the Supreme Court of Colorado, on behalf of the defendant in error, to strike this bill of exceptions from the record, as not being tendered and allowed in apt time, which motion, as shown by the record, was partially sustained and partially overruled. (See printed record, pages 91 to 94.) This action of the Supreme Court of Colorado, presents one of the questions for consideration in this court.

I.

The statutes of Colorado, relating to practice, provide that in all cases "where either party shall except to any ruling, decision, or opinion of the court, and shall reduce such exception or exceptions to writing, it shall be the duty of the judge to allow the same, and sign and seal the same, at any time during the term of the court at which such excep-

tions were taken, or at any time thereafter to be fixed by the court." (Rev. Stat. Col., 1868; p. 508, Sec. 21).

In construing this statute, the Supreme Court of Colorado has repeatedly held, both before and after the trial of this cause, that a bill of exceptions, unless signed and sealed during the term of court at which the exceptions were taken, or at a time thereafter fixed by the court, would not be regarded as a part of the record.

Orman vs. Keith, 1 Col., 82.
Murphy vs. Cunningham, 1 Col., 470.
Eldred vs. Malloy, 2 Col., 20.
Cramer vs. Kansas Pacific R'y Co., 4 Col., 96.
Jordan vs. Finley, 4 Col., 189.
Filley vs. Cody, 4 Col., 542.
Packard vs. Spellings, 3 Col., 109.

The practice adopted in the Supreme Court of the United States is the same as that announced in this statute and the cases above cited.

Muller vs. Ehlers, 1 Otto, 91 Sup. Ct., p. 250.

In the case of Orman vs. Keith the bill of exceptions was filed in vacation without an order of court, and it was for this reason, disregarded. In the case of Cramer vs. The Kansas Pacific Railway Company, 4 Col., 96, thirty days were given in which to file a bill of exceptions. Thirty-one days elapsed between the day of the order and the filing of the bill of exceptions, and it was held that the judge had no authority to sign the bill of exceptions tendered after the expiration of the time limited by the order. In Jordan vs. Finley, 4 Col., 189, it was held that in the absence of an order of court, as provided in the statute, permitting a bill of exception to be signed after the expiration of the term, a bill of exception signed after the term closed, and in vacation, was no part of the record. And it may be said that the established doctrine of the Supreme Court of Colorado, both before and since the trial of this cause, has been to disre-

gard bills of exceptions not signed during the term of court when the exceptions were taken, unless an order of court entered of record, or a stipulation of the parties, permitted it to be tendered and signed thereafter.

In this case the court, as we think, departed from the rule announced in the above cases, and considered the bill of exceptions so far only as the proceedings had at the trial term related to the ruling of the court on the motion for a new trial. (See the opinion of Hallett, C. J., printed record, page 102, 3 Col., 129.) Notwithstanding what is said in the opinion of Wells, J., on the motion to strike this bill of exceptions from the record (see opinion on printed record, pages 99 to 102, and by Hallett, C. J., in the case of Packard vs. Spillings, 3 Col., 112) we submit most respectfully that no good reason is given why this case should be distinguished from the case of Packard vs. Spillings, or any of the other cases cited. If the bill of exceptions had been perfected as required by the statute, it would have aided the court in the consideration of the questions involved in the motion for a new trial, which, without it, must have remained only in memory, or in the imperfect notes sometimes preserved by judges on such trials; but, aside from this, no reason is assigned to show why the statute was not complied with and time taken to tender the bill of exceptions. If for any reason the motion for a new trial could not be heard at the trial term, the whole difficulty could have been remedied by the entry of an order giving time to file it a day far enough ahead to allow the motion for a new trial to be heard. There is nothing in the record to show why the motion was not determined at the trial term. No presumption can be indulged that this verdict was rendered at the close of the term. The fact is, that the term continued for six weeks after the rendering of the verdict, and there was nothing to prevent the hearing of the motion and the perfecting of the record at the trial term; so that, in any view to be taken of the question, no good reason is assigned why such a distinction should be made in this par-

ticular case. Good practice required that the bill of exceptions should have been perfected, so far as exceptions were taken at the trial term. This is held by all the authorities, and if this rule were enforced in all cases, it would rather tend to aid the court at a subsequent term in the consideration of motions for new trials remaining undisposed of, than to lead to embarrassment or injustice in the case. It will be seen by the record that two orders were entered by the court with reference to the filing of the bill of exceptions. The first of these orders gave the defendant thirty days to file its bill of exceptions to the *ruling of the court upon the motion for a new trial.* The second order gave the defendant until the 30th of November, 1874, to tender to the judge its bill of exceptions, *reserved by it upon the trial of the cause*, all of which occurred at the previous term of court (see printed record, page 7). It is the second of these orders that we complain of, and therefore insist that the proceedings contained in this bill of exceptions, which took place at the trial term of the court, should now be disregarded by this court in the consideration of this cause.

II.

It will be seen from an inspection of the record that no exceptions were taken by the defendant to the charge of the court to the jury, or to the refusal of the court to instruct the jury as prayed by the defendant. (See printed record, page 86.) The record does show that the defendant "*objected*," but no exception whatever was taken. It has been repeatedly held that an objection only is not enough, but that the exceptions should be distinctly preserved in the bill of exceptions, or the objection will be disregarded.

Laber vs. Cooper, 7 Wall., 570-571.
Pomeroy's Lessees vs. The Bank of Indiana, 1 Wall., 601-602.
Vance vs. Cowing, 13 Ind., 462.
Dickerson vs. Turner, 15 Ind., 718.

If, therefore, the bill of exceptions should be regarded as properly a part of the record, we submit that the error assigned upon the charge to the jury, and the refusal to instruct as prayed by the defendant, cannot be considered in the absence of proper exceptions.

Storm vs. United States, 94 U. S., 4 Otto, 76.
Mutual Life Ins. Co. vs. Snyder, 93 U. S., 3 Otto, 393.

It is also assigned for error that the court erred in overruling defendant's motion for a non-suit. (See record, page 88.) In response to this we need only call attention to the fact that no exception whatever was taken to the overruling of this motion. (See record, page 33.)

III.

By reference to the opinion of Hallett, C. J., in this case, it will be seen that the Supreme Court of Colorado considered only the question whether the finding of the jury was warranted by the evidence or not. (See printed record, pages 102 to 104). The view taken in this opinion covers the whole ground, and leaves little further to be said, and as we will have no opportunity to examine the brief of counsel before the final hearing of the cause, we propose to repeat the argument submitted to the court below on this question.

It was conceded in the argument before the Supreme Court of Colorado that the jury were warranted from the evidence in finding that the employers of the defendant were guilty of negligence in the killing of the deceased, but it was insisted that this evidence also showed contributary negligence on the part of the deceased, and for this reason a motion for a new trial should have been granted.

The proposition advanced by counsel assumes that the evidence disclosed a case of contributary negligence, *per se*, and for this reason the court erred in permitting the jury to pass upon the question.

In the discussion of the proposition, counsel asked the court below to consider the question upon a review of the evidence given by the plaintiff only, on the opening of the case to the jury, without reference to the evidence produced by the defense, or in rebuttal by the plaintiff; this might be proper if we were considering the action of the district court in overruling the motion for a non-suit, but, as already stated, no exception was taken to the overruling of this motion, and for this reason we submit that the question cannot be met in this way. If the action of the court is to be reviewed at all on this record, all the evidence given at the trial, together with the surrounding circumstances, must be considered, just as it is to be presumed the jury so considered such evidence. The record shows (see page 21) that the jury were sent under the instructions of the court to examine the place where the accident occurred. It must be presumed that this examination was made and considered with reference to the evidence of the witnesses examined in the case, and that as to all inaccuracies as to distances and other matters, the jury, from this examination in connection with the evidence, were fully prepared to pass upon the question of the contributary negligence of the deceased. Under such circumstances we submit that it would be a novel proceeding to determine this question of contributary negligence from a review solely of the evidence of the plaintiff.

We submit that the appellate court cannot, as matter of law, hold that the district court erred in submitting the question of contributary negligence to the jury. Entertaining this view, we submit that—

First—The deceased was only bound to use ordinary care, and as a general proposition where the negligence of a party is relied upon to defeat his recovery, he must have been guilty of at least ordinary negligence. His failure to take unusual care is no defense to the action:

Davis vs. Mann, 10 M. and W., page 548.
Shearman and Redfield on Neg., sec. 29

Johnson vs. Hudson River R. R. Co., 6 Duer, 645, 646.
Ernst vs. Hudson River R. R. Co., 35 N. Y., pages 9, 26.
Whiton vs. Chicago and N. W. R. R. Co., 2 Bissell, 185, 386.

Second—The natural presumption is that Twombly used ordinary care, and it cannot here be imputed to him as negligence that he did not anticipate the culpable negligence of the appellant:

Shearman and Redfield on Neg., sec. 31.
Pennsylvania Railroad Co. vs. Weber, 76 Pa., 168.
Johnson vs. Hudson River R. R. Co., 5 Duer, pages 23, 24.

Third—The burden of proving that Twombly was guilty of contributary negligence was upon the defendant, and it was a question for the jury:

Johnson vs. Hudson River R. R. Co., 5 Duer, p. 21.
Railroad Company vs. Gladmon, 15 Wall, 406.
Wharton on Neg., sec. 423.
Shearman and Redfield on Neg., sec. 44.

Fourth—Whether the deceased, in this case, was guilty of contributary negligence, or not, was clearly a question for the jury to determine from all the facts and circumstances before them:

Whiton vs. Railroad Co., 13 Wall, 270.
Same Case, 2 Bissell, 282.
Crissey vs. Railroad Co., 75 Pa. St., 83.
Railroad Co. vs. Weber, 76 Pa. St., 157.
Railroad Co. vs. Crawford, 24 Ohio St., 640.
Myers vs. Railroad Co., 59 Mo., 255.
Wyatt vs Railroad Co., 55 Mo., 485.

In the case of Whiton vs. Chicago & N. W. Railroad Company, 2 Bissell, Mrs. Whiton was killed while crossing the

railroad track on one of the public streets of Janesville, Wisconsin, under almost similar circumstances to the case at bar. The court refused to instruct the jury that it was the duty of Mrs. Whiton, in attempting to cross the railroad track, to look up and down the track, and Judge Drummond in overruling the motion for a new trial says: "Many instructions requested by the defendant were to this effect, that it was the duty of Mrs. Whiton before attempting to cross the track to look carefully up and down to see what obstacle was in the way, and even to stop for that purpose, and, if that was not done, it was negligence." The court instructed the jury that Mrs. Whiton "must have observed due care, caution and prudence. These imply needful and usual foresight and watchfulness. We are not prepared to say to any person who, in a populous town, at a railroad crossing, in walking on the street, shall fail to pause and look along a track, is guilty of such negligence as to prevent a recovery for injury inflicted by the fragrant wrong of those on a passing train." We have to take men and women as they are, and judge of them by their conduct under other circumstances. Suppose the reason a person does not look up and down the track, is that the bell of the engine is not rung, and can an engine be permitted to recklessly run over passengers, because if they do not get out the way they are guilty of contributary negligence and therefore ought to be killed. The very object of ringing the bell is to attract attention. It will often happen, as indeed observation proves, that persons walking over a railroad track on a public street of a town will be more or less preoccupied, and those who control so powerful an instrument of destruction as a locomotive in motion, are required to ring the bell to make them watchful. We ask the court to read the entire opinion of Judge Drummond in the above case, because it not only covers the case at bar as to the facts, but in our judgment is conclusive upon the legal questions involved in this case, both as to the question of negligence of the defendant, and the contributary negligence of the deceased.

The same view of this question is taken in the case of The Pennsylvania Railroad Co. vs. Weber, 76 Pa. State Rpts., 167. In that case the court say: "Nor was it incumbent on the plaintiff, in order to recover damages for his death, to show affirmatively that before attemting to cross the track, he did stop and look and listen. The common law presumption is, that every one does his duty until the contrary is proven, and in the absence of all evidence on the subject, the presumption is, that the deceased observed the precautions which the law prescribes before he attempted to cross the defendant's road." (See page 168.)

The case of the Railroad Company vs. Crawford, 24 Ohio State Repts., 631, is another recent case in which it was claimed that the testimony did not warrant the verdict. The facts of the case are also similar to the one at bar, and the court say (page 640): "It is not true as a matter of law or of fact, that the plaintiff's intestate was guilty of negligence which would prevent a recovery, if, *under any circumstances*, without signs and signals, he omitted to use his eyes and ears to the extent of his opportunity to see, hear and avoid danger."

The negligence of plaintiff is matter of defense to be proved by the defendant. (Johnson vs. Hudson River Railroad Co., 5 Duer, 21; Pennsylvania Railroad Co. vs. Weber, 76 Pa. State Rpts., 168; Shearman & Redfield on Neg., Sec. 44.) There being no legal presumption of negligence in this case, the plaintiff was not called upon in her evidence to prove a negative. Whether the deceased was guilty of contributary negligence or not was clearly a question for the jury, to be determined from all the facts and circumstances in evidence before them, and not from a consideration of a part only of such evidence; and therefore we submit that, in view of the authorities cited upon this question, the verdict in this case ought not to be disturbed. Where a party jumped or stepped from a car while it was in rapid motion, it was held to be error to instruct the jury that such conduct, *per se*, constituted negligence in law. The question of negligence in such case being for the jury.

It was urged by counsel before the Supreme Court of Colorado, that in the consideration of Twombly's position and conduct at the time of the accident, as presented in the plaintiff's evidence, the court must be governed by the common law rule as to contributary negligence, and not by what is commonly called the Illinois rule of comparative negligence. Whether the Illinois rule be correct or not, we need not stop to inquire. It is sufficient to say that the rule has been upheld by other courts than that of Illinois.

See Bridge vs. Grand Junction Railway Co., 3 M. and W., 246; Davis vs. Man, 10 M. and W., 348, where it is said, "that the negligence which is to preclude the plaintiff from recovering must be such as that he could by ordinary care have avoided the defendant's car"; and, that "the plaintiff in such a case may recover, although there may have been negligence on his part." The doctrine of this case was fully affirmed in the court of exchequer, in February, 1874 (see L. Repts. Echq., vol. 9, 74). The same doctrine has been held in Connecticut and other states.

Wyatt vs. Railroad Co., 55 Mo., 485.
Myers vs. Railroad Co., 59 Mo., 223.
Railroad Co. vs. McElmurry, 24 Geo., 75.
Kerwhacker vs. Railroad Co., 3 Ohio State Reports, 172.
Richmond vs. Railroad Co., 18 Cal., 351.
Railroad Co. vs. Crawford, 24 Ohio St., 631.
Isbell vs. Railroad Co., 27 Con. (a case which we urge the court to examine fully).
Railroad Co. vs. Collins, 2 Duval, 116.
Railroad Co. vs. Arthur St. John, 5 Sneed, 524.
Shea vs. Railroad Co., 44 Cal., 414.

The same doctrine was also held by Judge Drummond in the case of Whiton vs. Railroad Co., 2 Bissell, 287, where it is said that "it will be found, on examination of the cases in those courts which will not permit a recovery where there has been any fault whatever on the part of the person injured, that they are very much influenced by the conduct of

the other party. If the wrong is flagrant, they are inclined to hold that to be the cause of the injury."

The rule followed in this case is the same as that laid down in the case of the Railroad Co. vs. Whiton, 2 Bissell, 282, and 13 Wall., 270; and if, as we contend, there was evidence showing negligence on the part of the defendant, evidence as in the cases before cited, from which the jury had the right to infer that the accident would not have occurred but for this negligence, and that the plaintiff was free from contributary fault, then the court was right in submitting the case to the jury, and their verdict must be maintained.

Railway Co. vs. Stout, 17 Wall., 663.
Railroad Co. vs. Crawford, 24 Ohio State, 631.

In connection with these authorities we now propose briefly as possible to state some of the facts substantially as they appear in evidence, and which we think made it the duty of the district court to submit the question of contributary negligence to the jury. The railway track of the plaintiff in error was laid on Wynkoop street, a public street in the city of Denver, which crossed I, or Eighteenth street, another public street. On the same street was also located the track of the Denver and Rio Grande Railroad Company. By what authority, if any, these railroad tracks were laid in the public street of the city, does not appear. From this fact we submit that no presumption is to be indulged against the right of the deceased as one of the public to use these streets in going to and from his daily business. About the time the accident occurred a lengthy freight train was passing out of the city on Wynkoop street. The employees of the plaintiff in error was at about the same time backing up its switch engine, moving backwards in an opposite direction from that of the other train. The freight train started from its depot, a block or so from I, or Eighteenth street. The switch engine of the defendant started, apparently, shortly after the freight train, backing up from G, or Sixteenth street, about as far distant from the latter street on the

one side as the depot of the Rio Grande road was on the other. The freight train was moving at the rate of five or six miles an hour. The switch engine of the defendant was backing up at about the rate of three or four miles an hour, or, as the witnesses for defendant say, "not as fast as a man could walk." It should be remembered this was a switch engine and had no regular time for crossing public highways like those drawing regular trains, and there was no necessity for its moving at a time when the street was occupied by the other train, and no occasion for its passing across Eighteenth street until the other train had cleared it, and had it not done so it is clear that Twombly would not have been killed. The movement of the freight train would naturally attract attention as it was going out, and doubtless did attract the attention of the deceased to the exclusion of other things to a considerable extent. This is the effect it would have upon most men using ordinary care. The noise of the freight train would prevent the movement of the switch engine from being heard, as it moved slowly and stealthily, "backing up" the track. The slow rate at which it moved, as well as the fact that it was moving backwards, would have easily prevented an ordinarily prudent man from discovering at the distance of two blocks that it was moving at all. When Twombly started across the track, therefore, and looked towards the switch engine, it is but natural to suppose if it were moving backwards, slowly, that he believed it not to be in motion, and that there was nothing to cause him to think of danger from it under the circumstances.

The witness, Goodfellow, says he saw Twombly going towards the track of the defendant on Wynkoop street, on Eighteenth street, about the usual hour for men to go to work in the morning. He says Twombly was in a hurry and going to Wazee street to clean out a house. It is clear from all the evidence, that this was before the freight train had reached I, or Eighteenth street, and it is a fair inference from the evidence, that the switch engine had not started to

back up the track, or was moving so slowly that it appeared to be motionless, at this time.

The witness, Truax, met Twombly on the Rio Grande track, Twombly having already crossed the track of the defendant. Truax was going north towards the river, walking very fast, and Twombly was going in the opposite direction. Truax says: "I put my hand on his shoulder and caused him to move on to the wide gauge track, and spoke to him —less than a minute, probably, about a plow," (page 25). In another place witness says, when he met him: "I was not inclined to wait, so I took him along with me," (page 26). Again, he says, when he met Twombly, both were walking fast and witness took him along, because he had only time to cross ahead of the narrow guage train (page 27). Again, witness says: "I met Twombly on the narrow gauge, so near I was obliged to remove him. I took him along with me; he did not stop me; I had barely time to pass forward of the Rio Grande track; had only halted a moment to speak to Twombly; had got about twenty feet away when I heard the outcry," (page 28). While witness and Twombly were together they faced toward the end of the Rio Grande train, but this was only a short period before the accident. If the witness, Truax, is correct in his testimony, Twombly would have passed clear of both tracks before even the Rio Grande train reached I, or Eighteenth street. Being stopped by Truax for the moment, he waited for the latter train to pass. Truax, although crossing Eighteenth street almost directly toward the switch engine, did not observe that it was in motion. This is not strange if it were not going as fast as a man would walk. Probably the talk between deceased and Truax was somewhat more lengthy than he now remembers it, and probably he had gone a little farther from the deceased before the accident happened than he states in his testimony; but there was doubtless a very short interval, which seemed even shorter to the deceased, who was watching the moving train, with his thoughts more or less upon the work and business of the day, as was natural and proper.

Supposing that he had, as he approached the crossing, looked in both directions, as he doubtless did, had seen the switch engine two blocks distant, apparently still, had been stopped and prevented from crossing before the Rio Grande train by unexpectedly meeting Truax, and could not then cross till the train passed, and stood waiting for it to do so, why should his thought or attention revert to the switch engine? He knew that it always moved slowly, and never "on time;" knew that it could be easily stopped, knew that there was no necessity for its pushing on while Eighteenth street was blocked by the other train; knew that the employees in its charge could see the entire distance from where they started to and beyond Eighteenth street, if they would raise the cab window, or even without doing so, knew that it was the duty of those in charge to keep a lookout; and especially so if they attempted to run when the Rio Grande train was causing noise and confusion and attracting attention; knew that it was their duty to ring the bell or sound a whistle as they backed their engine to the crossing, and knew that if, when looking out, they saw fifty feet before them a human being at the crossing, his thought and attention engrossed by the other train, it was in their power, and in the exercise of even ordinary care, was their duty to stop; and knowing all this, what was there to forewarn him that he was likely, without a sound or note of warning, to be hurled into eternity by the carelessness, negligence, yes, even cruel recklessness of those who ran this switch engine upon and over him. Surely was there not evidence from which the jury could infer that the deceased was not wanting in ordinary care, and that nothing he did was the proximate cause of his injury? Nay, is not the evidence strong, and the conclusion irresistible, that the deceased acted with the precaution and care of ordinary men, and that what he did was not even the remote cause of his death? And if the jury had otherwise found, would it not have been contrary to the almost universal judgment of men? It is said by an able writer that in an action of this kind, where it is a material question whether or not the party

injured might have escaped the injury by ordinary care on his own part, the defendant is not excused merely because the injured party knew that some danger existed through the defendant's neglect, and voluntarily incurred the danger, but all the circumstances are for the jury. (1 Hillard on Torts, 3d ed., page 153.) Where the question of contributary negligence depends upon a variety of circumstances, from which different minds may arrive at different conclusions as to whether there was negligence or not, the question ought to be submitted to the jury.

Railroad Co. vs. Stout, 17 Wall., 663.
Railroad Co. vs. Pickley, 24 Ohio St., 654.

After the witness Truax carried the deceased back with him, the Rio Grande train passed I, or Eighteenth street, and prevented Twombly from pursuing his journey. The evidence shows that the Rio Grande engine and the switch engine met somewhere near the middle of the block between H and I streets, so that it is evident that at this time the switch engine was one-half block or more from where deceased was. From this fact the jury might well infer that, when Twombly first crossed the defendant's track, the switch engine was still at the coal yard, and had not commenced to back up towards Eighteenth street.

From the witness Giles' testimony there is evidence from which the jury might infer that, just before the accident, Twombly was between the railroad tracks, and not on the broad gauge road at the time he was struck by the tender, and this view is strengthened by the fact that the first thing seen of Twombly by Moulton was his feet in the air and his head passing under the drivers of the engine. If he had been on the track he would have been struck by the tender, and could not possibly have fallen under the engine. From this state of facts the jury, we think, had the right to find from this evidence ordinary care on the part of Twombly.

I street was a public highway, and Twombly had just as

much right to occupy it as the defendant—his only duty in doing so was to exercise ordinary care.

Shea vs. Railroad Co., 44 Cal., 414.
Shearman & Redfield on Neg., Sec. 481.

It was the duty of the employés of the defendant, in using this street, to ring its bell, keep a proper lookout in backing its engine up the street, so as not to endanger the safety of those using it. The jury had the right to infer from the evidence that the bell was not rung, that no lookout was kept and that the parties in charge of this engine recklessly omitted every duty required of them for the protection of persons using this street.

Shearman & Redfield on Neg., Sec. 481.
Whiton vs. Railroad Co., 2 Biss., 282.
Barley vs. Railroad Co., 4 Biss., 432.

The presumption is that Twombly exercised ordinary care at the time he crossed the defendant's track, and the evidence shows that he incurred no risk in doing so. It will not be pretended up to this time that he was guilty of any negligence whatever.

If the switch engine had left the coal yard at the time Twombly crossed the defendant's track (which is not clear from the evidence), it is clear that it was slowly backing up an up-grade, as shown by the evidence, and a person walking fast as Twombly was, in looking in the direction from which it was backing, might well have supposed that it was standing still; and, we submit the jury might have adopted this view from the evidence.

Again, Truax says he detained Twombly about one minute. The distance from the coal yard to G street was not to exceed 1,200 feet. Moulton says the Rio Grande and switch engines met about the middle of the block between H and I streets. On this theory, we submit that the jury might well infer that, when Twombly first crossed the defendant's track, the switch engine had not left the coal yard;

and, if so, in no view could ordinary negligence be imputed to Twombly.

The evidence shows clearly that Walker took the engine down that morning for no other purpose than to get his breakfast; and, if it be true that Twombly was acquainted with the locality of this track, and that trains frequently passed up and down, we submit that he was not expected to know that the engine would be run for the purpose of taking the engineer to breakfast.

The jury had the right from the evidence to find that Twombly was not in fault in being stopped by the witness Truax. He was placed in the position he was by the act of Truax, and not by his own voluntary act. If, when he crossed the defendant's track, the switch engine was still at the coal yard, he had no reason to expect its approach when Truax brought him back, and it was but natural, being in a hurry and desiring to proceed on his journey, that his attention should be first attracted by the Rio Grande train. Twombly's situation and conduct at this point may well be contrasted with the situation and conduct of Mrs. Whiton, in the case in 2 Bissell, 282; and we submit that the jury were justified in finding that Mrs. Whiton was not guilty of ordinary negligence; the verdict in this case must be sustained on the same grounds.

The jury in this case were warranted under the facts in coming to the conclusion that Twombly's death was caused by reason of a failure on the part of the persons on the switch engine to keep a proper lookout, and to give warning by ringing the bell.

Twombly was killed, as appears from the evidence, within a few seconds after Truax left him. If the bell had been rung and a proper lookout been kept his life could undoubtedly have been saved. It devolved upon the defendant, under the circumstances, to perform this duty, and it is no apology for such conduct to say that he was guilty of contributary negligence, because, during the last few seconds of his life his attention was naturally attracted to the Rio

Grande train, and omitted to look in the other direction. If the switch engine had not left the coal yard when Twombly first started to cross I street, it would hardly be expected that he would look in that direction for danger. Both he and Truax did what ninety-nine men out of every hundred would have done under like circumstances. Twombly had a right to suppose under such circomstances, that there was no engine moving upon the defendant's track, and, as before stated, it was but natural that he should watch the Rio Grande train until it had passed, with the purpose of pursuing his journey. Under such circumstances, to ask the plaintiff in the case to prove a negative, and the court to presume that he did not use the ordinary care of a prudent man, is inconsistent with reason and common sense, nay, it would be requiring of the plaintiff to prove that Twombly used *unusual care* on that occasion. This was not required of him. It is held by all the authorities that a failure to take *unusual care* on the part of the deceased is no defense to the action. All that was required of Twombly was the exercise of ordinary care.

Shearman & Redfield on Neg., Sec. 29.
Ernest vs. Hudson River Co., 35 N. Y., 9.
Beisiegel vs. Railroad Co., 34 N. Y., 624.

In the case in 34 N. Y., page 26, the court use this language, which we think clearly cover the facts of this case: "The testator was lawfully upon the public highway. The right he had to use it was as perfect as that of the defendant to cross it. In the exercise of his legal privilege he did not expose others to injury, and was charged with no duty of extraordinary vigilance. The defendants exercised theirs, with agencies imminently perilous to human life, and they were under a co-relative obligation to use them with the highest degree of care. As the highway was never dangerous, except when they made it so by driving their engines across it, and, as they never crossed it without some degree of jeopardy, to the wayfarer, the law provided for the security and protection of the citizen, by requiring the defendants to

give special and public warning, whenever their engines approached the crossing." Tested by the reasoning of the court in the above cases, as well as the cases heretofore cited from 2 Bissell, 76 Pennsylvania, 24 Ohio State, we submit that the verdict of the jury in this case was eminently just and proper.

The entire argument of counsel in the court below was based upon the fact that there was no evidence to show that the deceased, at the time the witness Truax removed him back, looked up and down the defendant's track. Counsel select this fact, and seek to separate it from all the other evidence in the case, and ask to have the verdict set aside for this reason alone. To support this view it was urged that the case of Bellefontain Railway Co. vs. Snyder, 24 O. St., 670, supports their view of this question. It will be seen, however, that the facts of the case are not similar to the facts of the case at bar. In this case the accident occurred at the crossing of a public street, while in that case the children were not upon a public highway. If we place the little girl injured in that case in Twombly's place, and apply the rule laid down by the court in that case, we submit that the result must have been different, or we must conclude that the court in that opinion is in conflict with their opinion in the previous case reported in the same volume and heretofore referred to.

Railroad Co. vs. Crawford, 24 O. S., 631.

It was also contended by counsel that Twombly was not lawfully on the track. We have already shown from the evidence of Giles, and the statement of Moulton as to where Twombly was when he first saw him, and his falling under the driving wheels of the engine, which we think clearly shows that he was not on defendant's track when the accident occurred, but must have been somewhere between the two tracks; but, be this as it may, we still insist that Twombly had the same right to use I street, and to be upon it, as defendant had.

Shearman & Redfield on Neg., sec. 481.
Railroad Co. vs Heilemann, 49 Pa. St., 60.
Ernst vs. Railroad Co., 35 N. Y., 26.
Shea vs. Railroad Co., 34 Cal., 414.

The cases cited by counsel on this point do not relate to highways in public use.

That the defendant was guilty of gross negligence, we think there can be no doubt, when all the evidence is considered. The track of the defendant was laid in a public street; by what authority it was done does not appear in this case, nor is it important; for, in the language of Judge Drummond in Barley vs. The Railroad Co., 4 Bissell, 432: "In all such cases there should be a proper and sufficient lookout kept upon the train, and, in a case like this, there should be a person watching at the place of danger. I think there should be a person watching the track so as to enable the engineer to know when there was an obstruction upon it, so that the train could be stopped in a reasonable time." A railroad company, running its trains over the streets of a populous city, are held to a high degree of care, and a reckless omission to perform its duties so as to protect human life is nothing but gross negligence. If, as has been shown, it was the duty of defendant's agents to keep a vigilant lookout, to ring the bell and thus warn persons on the street of the approach of their engine, a failure to perform such a duty, amounts to recklessness, carelessness, and is properly denominated gross negligence. Several of the authorities already cited are in point on this question. And whether there be different degrees in what is denominated negligence or not, matters little, so far as this question is concerned. The conduct of the defendant in this case, is shown to have been grossly reckless and unjustifiable, and this, in fact, amounts to the same thing.

Counsel claim also that the charge of this court as to what constitutes gross negligence was erroneous. No exception whatever was made to the instructions of the court. Where instructions are not excepted to at the time they will not be considered in the appellate court. We think there was evidence to warrant and support the conclusions arrived at by the jury, and that the judgment should be affirmed.

J. Q. CHARLES,
For Defendant in Error.